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80-674
No. ——

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1980

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LAREDO PACKING COMPANY,
*Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD,
*Respondent.*

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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## QUESTIONS PRESENTED

1. Whether, in a dual motive discharge case involving Section 8(a)(3) of the National Labor Relations Act, a violation of the Act may not be found unless the NLRB finds that the dominant or "but for" cause for the discharge was the employer's desire to encourage or discourage membership in a labor organization?

2. Did the Court of Appeals grossly misapply the substantial evidence test when it upheld the NLRB's finding that the discharge of Ignacio Santos violated Sections 8(a)(3) and (1) of the National Labor Relations Act where (1) the NLRB did not find that Santos was ever interrogated concerning his union activity; (2) the NLRB's decision admits that "there is no direct evidence of Company knowledge" of Santos' union activity; and (3) the NLRB inferred that the Company knew of Santos' activity because a supervisor told Oscar Martinez that "he had information that several truckdrivers and kill floor employees were involved with union activities" and asked Martinez to watch two such employees, Alfredo Moncivais and Gregario Juarez?

3. Did the Court of Appeals grossly misapply the substantial evidence test when it upheld the NLRB's finding that the discharge of Gerardo Moncivais in early January of 1977 violated Sections 8(a)(3) and (1) of the National Labor Relations Act where (1) the NLRB's decision admits that "there is no direct evidence of company knowledge concerning Moncivais' union activity"; and (2) the NLRB inferred such knowledge principally because several months after the discharge occurred a supervisor told Mario Moncivais that "all of the Moncivaises would be discharged because they were responsible for bringing the Union in"?

## PARTIES

Laredo Packing Company and the National Labor Relations Board were the parties to this litigation in the Court of Appeals.

## INDEX


| | Page |
|---|---|
| QUESTIONS PRESENTED | i |
| PARTIES | ii |
| OPINIONS BELOW | 1 |
| JURISDICTION | 1 |
| STATUTE INVOLVED | 2 |
| STATEMENT OF THE CASE | 2 |
| REASONS FOR GRANTING THE WRIT | 8 |
| 1. The Test Adopted by the Fifth Circuit For Finding an 8(a) (3) Violation in a Mixed Motive Discharge Case Conflicts with the Test Utilized by the Courts of Appeals for the First, Second and Ninth Circuits | 8 |
| 2. The Court of Appeals Grossly Misapplied the Substantial Evidence Test when It Sustained the Board's Findings Concerning the Discharges of Ignacio Santos and Gerardo Moncivais | 14 |
| CONCLUSION | 17 |
| APPENDIX A—Opinion of the Court of Appeals, September 8, 1980 | 1a |
| APPENDIX B—Decision and Order of the National Labor Relations Board, 241 NLRB No. 24 (1979) | 3a |
| APPENDIX C—Sections 8(a) (1) and (3) of the National Labor Relations Act of 1935, as amended, 29 U.S.C.A. Sections 158(a) (1) and (3) (1973) | 78a |

## TABLE OF CASES


| | Page |
|---|---|
| Amyx Industries, Inc. v. NLRB, 457 F.2d 904, 906 (8th Cir. 1972) | 15 |
| Bill's Coal Company v. NLRB, 493 F.2d 243, 246-47 (10th Cir. 1975) | 15 |
| Coletti's Furniture, Inc. v. NLRB, 550 F.2d 1292, 1293-94 (1st Cir. 1977) | 8 |
| Delchamps, Inc. v. NLRB, 585 F.2d 91, 94 (5th Cir. 1978) | 15 |
| Dubin-Haskell Lining Corp. v. NLRB, 375 F.2d 568, 573 (4th Cir. 1967) | 15 |
| Federation of Union Representatives v. NLRB, 339 F.2d 126, 128-29 (2nd Cir. 1964) | 15 |
| Givhan v. Western Line Consolidated School District, 439 U.S. 419 (1979) | 8 |
| Hackett Precision Company v. NLRB, 459 F.2d 463 (6th Cir. 1972) | 14 |
| Hubbard Regional Hospital v. NLRB, 592, F.2d 1251 (1st Cir. 1978) | 8 |
| Liberty Mutual Insurance Company v. NLRB, 592 F.2d 595, 606 (1st Cir. 1979) | 8 |
| Mt. Healthy City Board of Education v. Doyle, 429 | |
| NLRB v. Eastern Smelting and Refining Corpora- U.S. 274, 285-87 (1977) | 8, 9, 10 |
| tion, 509 F.2d 666, 671 (1st Cir. 1979) | 10 |
| NLRB v. Electro Mart, 523 F.2d 410, 413 (9th Cir. 1975) | 15 |
| NLRB v. Fibers International Corporation, 439 F.2d 1311, 1312 (1st Cir. 1971) | 8 |
| NLRB v. Garner Tool and Die Mfg. Co., 493 F.2d 263, 267-68 (8th Cir. 1974) | 14, 15 |
| NLRB v. Montgomery Ward & Co., 554 F.2d 996, 1002 (10th Cir. 1977) | 12 |
| NLRB v. Townhouse T.V. & Appliance, Inc., 531 F.2d 826, 828 (9th Cir. 1978) | 13 |
| NLRB v. Walton Mfg. Co., 369 U.S. 404, 408 (1962) | 17 |

TABLE OF CASES—Continued


| | Page |
|---|---|
| Oil, Chemical & Atomic Workers International Union v. NLRB, 547 F.2d 575, 590 (D.C. Cir. 1970) | 13 |
| Stephenson v. NLRB, 614 F.2d 1210, 1213 (9th Cir. 1980) | 11 |
| Texas Instruments, Inc. v. NLRB, 599 F.2d 1067, 1073 n.6 (1st Cir. 1979) | 8 |
| Universal Camera Corporation v. NLRB, 340 U.S. 474, 491 (1951) | 17 |
| Waterbury Community Antenna, Inc. v. NLRB, 587 F.2d 90, 99 (2nd Cir. 1978) | 8, 10 |
| Western Exterminator Co. v. NLRB, 565 F.2d 1114, 1118 (9th Cir. 1977) | 11 |
| Wright Line, 251 NLRB No. 150, 105 LRRM 1169 (1980) | 13, 14 |

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Laredo Packing Company, Petitioner herein, prays for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on September 8, 1980.

## OPINIONS BELOW

The opinion of the Court of Appeals (App. A, *infra*) has not yet been officially reported. The decision and order of the National Labor Relations Board (App. B, *infra*) is reported at 241 NLRB No. 24 (1979). Each of the foregoing decisions are set forth in the Appendix.

## JURISDICTION

The judgment of the Court of Appeals was entered on September 8, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and 29 U.S.C. § 160(e).

## STATUTE INVOLVED

This case involves the interpretation and application of Sections 8(a)(1) and (3) of the National Labor Relations Act of 1935, as amended, 29 U.S.C.A. §§ 158(a)(1) and (3) (1973), which are set forth in the Appendix (App. C, *infra*).

## STATEMENT OF THE CASE

### A. The Discharges of the Truckdrivers

Laredo Packing Company (the "Company") operates a plant in Laredo, Texas, where it is engaged in the wholesale slaughtering and distribution of beef and related products. The Amalgamated Meat Cutters and Butcher Workmen of North America, Local 171 (the "Union") began an organizing drive at the Company's plant in November of 1976. A petition for an election was filed on November 26, 1976. The election was held on January 6 and 7, 1977, and the Union was certified on January 21, 1977. The Company and the Union entered into a collective bargaining agreement on September 9, 1977.

By letter dated April 26, 1977, the Company's President, Roberto Salinas, was notified that his insurance carrier would no longer insure eight of the Company's truck drivers. The letter, which directs that policy exclusion forms for the drivers be returned not later than the first of May, reads as follows:

> Dear Roberto:
>
> I have received a letter from the Firemen's Fund Insurance Company requesting the exclusions of the following drivers from your policy: Epigmenio Oscar Martinex, Jr., Alfredo Moncivais, Jose Escamilla, Samuel Medina, Gregorio Juarez, Abel Hinojosa, Francisco Cabello, Jaime Galvan, Jr. and Juan Macias.

As you well know your automobile experience has not been good for the past three years. Your Experience Modifier went up five points, from 177% Debit to 182% Debit.

We must insist that you return the Exclusion Forms TX03-60A on the above named drivers no later than the first of May.

I have enclosed copies of the Motor Vehicle Records on the above named drivers for your information and I trust that in reviewing the drivers records you will recognize the urgency of the situation.

Sincerely,

J. C. Martin III
Insurance Associates, Inc.

Upon receipt of the letter Salinas directed Armado Garcia, a supervisor, to discharge the drivers. Seven of the drivers were discharged on April 29, 1980, and the eighth driver was discharged one week later. Shortly after the drivers had been discharged Salinas met with Erbey Rendon, a Union representative, and agreed that the Company would find jobs for the drivers on the kill floor as soon as such jobs became available. Thereafter, three of the drivers were offered jobs on the kill floor and one was offered a job as a laborer. One employee declined to accept the job offered to him; the other employees accepted the offers but quit after working a brief period of time.

On October 5, 1977, an unfair labor practice charge was filed alleging that the discharges violated Sections 8(a)(3) and (1) of the Act. A complaint subsequently issued and the case was tried before Administrative Law Judge ("ALJ") John P. von Rohr. The ALJ found that there was no evidence of collusion between the Company and its insurer. Nevertheless, he concluded that the dis-

charges were violative of Sections 8(a)(3) and (1) in that "the termination of the truckdrivers, at least in substantial part, was in retaliation for their union activities and support of the Union." In making that finding, the ALJ relied on various acts of interrogation, surveillance and threats by Garcia. Timely exceptions to the ALJ's decision were filed by the Company and by the General Counsel.

On March 19, 1979, the Labor Board issued its decision and order. The NLRB affirmed the rulings, findings and conclusions of the ALJ. Although the NLRB provided additional reasons in support of its decision that the discharge of the truckdrivers was unlawful, the Board did not make a finding that participation in union activity was the dominant or "but for" cause of the discharges. The ALJ's finding of lack of collusion between the Company and its insurance carrier was not disturbed by the NLRB. After emphasizing that there was no finding of collusion between the Company and its insurance carrier, Member Penello's dissenting opinion faulted the Board for finding the discharges unlawful:

> "My colleagues nevertheless hold that the discharges were caused by the employees' union activities, rather than the independent action of the insurance carrier. The majority states that 'Respondent's acquiescence' in the decision of the insurance company was unlawful because a 'clear alternative would have been to contact the insurance agent and see if any mistakes might have been made or if alternate insurance might have been available at additional cost or with another carrier.' However, whether or not Respondent exercised good business judgment in failing to protest the determination of the insurance company is not the issue before us. Where, as here, 'the employer has proper cause for discharging an employee, the Board may not rely on scant evidence and repeated inferences to make a

finding that places the Board in the position of substituting its own ideas of business management for those of the employer.' *Golden Nugget, Inc.*, 215 NLRB 50, 53 (1974), quoting from *N.L.R.B.* v. *Blue Bell, Inc.*, 219 F.2d 796, 798 (5th Cir. 1955)."

The Court of Appeals issued its *per curiam* decision enforcing the Board's decision on September 8, 1980. The Court specifically adopted the Board's opinion concerning the discharges of the drivers: "With particular regard to the eight truck drivers discharged due to their proported uninsurability, we rely on the Board's thorough and well-reasoned opinion reported at 241 N.L.R.B. No. 24 (1979)."

### B. The Discharge of Ignacio Santos

On or about January 15, 1977, Armando Garcia refused to reinstate Ignacio Santos following 67 days of absenteeism incident to his third alleged back injury in less than four years and his second lost-time incident in six months (R. 1626-28, 1201-03, 41, RX 11). Santos' most recent back injury occurred on October 4, 1976. He remained at work until October 14, when he left work to see a doctor. During the next three months Santos worked only on November 1 and from November 13 until December 8.

On January 14, 1977, Santos' doctor allegedly released him for light duty work.[1] The date on which Santos reported for work in January was disputed. Santos maintained that he reported for work on Saturday, January 15, and was told by Marinez to report on the following Monday; the Company's personnel records reveal that Santos was discharged on January 15 (RX 11). The Board credited Santos' testimony. Whatever the date, it

[1] The note from the physician was retained by Santos and was not introduced into evidence at the hearing before the ALJ (R. 43, 55).

is undisputed that when Santos attempted to return to work Martinez, his immediate supervisor, informed him that there was no more work for him because he was undependable and left work whenever he wanted to (R. 1627, 25). Santos then approached Roberto Salinas, who referred him to Armando Garcia. Garcia told Santos that there was no more work for him because he was undependable and because he was unwilling to displace the employee whom the Company has assigned to Santos' job during his lengthy absence (R. 1628, 48, 1202-03).

The NLRB found that the discharge violated Sections 8(a)(3) and (1) of the Act. Although the Board found that there was "no direct evidence of Company knowledge" of any union activity by Santos, it inferred such knowledge because supervisor Garcia told Oscar Martinez that "he had information that several truckdrivers and kill-floor employees were involved with union activities" and because Garcia asked Martinez to watch two such employees, Alfredo Moncivais and Gregario Juarez. Santos' name was not mentioned by Garcia.

The brief *per curiam* opinion issued by the Court of Appeals on September 8, 1980, merely held that the Board's findings of unfair labor practices were supported by substantial evidence on the record as a whole. The Court did not specifically address the propriety of the Board's finding that the Company had knowledge of Santos' activity in behalf of the Union.

### C. The Discharge of Gerardo Moncivais

Gerardo Moncivais, a truck driver, was suspended on December 24, 1976, and discharged a week or so later for abusing Company vehicles on two occasions. The cost of repairing the damaged trucks exceeded ten thousand dollars.

The first truck was damaged on December 12, 1976. Don Meis, a mechanic with more than seventeen years

experience, testified that the truck had a "seized" (frozen) bearing and a damaged crankshaft. Meis further testified that the degree of damage could have been lessened if Moncivais had paid closer attention when the problem first arose and had immediately stopped the truck (R. 1118-19). The cost of the repairs necessitated by Moncivais' negligence amounted to $3,571.00 (RX 13).

The second vehicle was damaged on December 19, 1976. The vehicle suffered broken pistons, bent push-rods and a damaged crankshaft (R. 1120, 1130). Meis testified that the damage had been caused by "over-speeding" and improper down-shifting by Moncivais (R. 1120). The cost of repairing the vehicle was $6,541.38 (RX 14).

In concluding that the Company seized upon the damage issue as a pretext for discharging Gerardo Moncivais because of his activity in behalf of the Union, in violation of Sections 8(a)(3) and (1) of the Act, the Board relied principally on the fact that Don Meis mistakenly testified that the second truck had been repaired by his mechanics when, in fact, the truck had been repaired by Mack Trucks of Corpus Christi (RX 14). However, Meis was not employed by the Company when he testified (R. 1122-23) and his lapse of memory in no way establishes that he lied about the extent of the damage to the trucks or the cause of that damage. Meis testified that he "saw the bent push-rods" (R. 1144) and monitored the progress of repairs (R. 1139). There is no dispute that Moncivais was driving the vehicles when the damage occurred.

The Board's opinion admits that "there is no direct evidence of Company knowledge concerning Moncivais' Union activity." The Board inferred that the Company knew of Moncivais' activity for the "same reasons" it gave in discussing the discharge of Ignacio Santos, *supra*. The Board also relied on a statement made by Armando Garcia in April of 1977, several months after the discharge of Gerardo Moncivais, to the effect that "all of the

Moncivaises would be discharged because they were responsible for bringing the Union in."

The Court of Appeals affirmed the Board's decision without discussing the issues raised herein.

## REASONS FOR GRANTING THE WRIT

### 1. The Test Adopted by the Fifth Circuit For Finding an 8(a)(3) Violation in a Mixed Motive Discharge Case Conflicts with the Test Utilized by the Courts of Appeals for the First, Second and Ninth Circuits.

Relying on this Court's decisions in *Givhan* v. *Western Line Consolidated School District*, 439 U.S. 410 (1979) and *Mt. Healthy City Board of Education* v. *Doyle*, 429 U.S. 274, 285-87 (1977), the Courts of Appeals for the First, Second and Ninth Circuits have held that no violation of Section 8(a)(3) of the Act is committed in a mixed motive discharge case unless the NLRB finds that the dominant or "but for" cause of the discharge is the employer's desire to encourage or discourage union membership. *Texas Instruments, Inc.* v. *NLRB*, 599 F. 2d 1067, 1073 n.6 (1st Cir. 1979); *NLRB* v. *Eastern Smelting and Refining Corporation*, 509 F. 2d 666, 671 (1st Cir. 1979); *Liberty Mutual Insurance Company* v. *NLRB*, 592 F. 2d 595, 606 (1st Cir. 1979); *Waterbury Community Antenna, Inc.* v. *NLRB*, 587 F. 2d 90, 99 (2nd Cir. 1978); *Coletti's Furniture, Inc.* v. *NLRB*, 550 F. 2d 1292, 1293-94 (1st Cir. 1977).[2]

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[2] Other First Circuit decisions applying the dominant or "but for" test include: *Hubbard Regional Hospital* v. *NLRB*, 592 F.2d 1251 (1st Cir. 1978) ("The Board must find that anti-union animus was the dominant motive for the discharge and that it would not have taken place "but for" such animus."); *NLRB* v. *Fibers International Corporation*, 439 F.2d 1311, 1312 (1st Cir. 1971) ("Having in mind that a business decision is involved, it has been our position that the Board has the burden of making a clear showing that the employer's dominant motive was not a proper business one, but union animus.")

*Mt. Healthy* and *Givhan, supra,* although not NLRB cases, involved the discharge of teachers because they had engaged in constitutionally protected speech.[3] In *Mt. Healthy* the Court rejected the view that a public employee must be reinstated whenever constitutionally protected conduct plays a "substantial part" in the employer's discharge decision because such a rule would require reinstatement of employees who would have been terminated even if the constitutionally protected conduct had not occurred:

> "A rule of causation which focuses solely on whether protected conduct played a part, 'substantial' or otherwise, in a decision not to rehire, could place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing. The difficulty with the rule enunciated by the District Court is that it would require reinstatement in cases where a dramatic and perhaps abrasive incident is inevitably on the minds of those responsible for the decision to rehire, and does indeed play a part in that decision—even if the same decision would have been reached had the incident not occurred. The constitutional principle at stake is sufficiently vindicated if such employee is placed in no worse a position than if he had not engaged in the conduct. A borderline or marginal candidate should not have the employment question resolved against him because of constitutionally protected conduct. But that same candidate ought not to be able, by engaging in such conduct, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record, simply because the protected conduct makes the employer more certain of the correctness of its decision." 429 U.S. at 285-86.

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[3] However, as the First Circuit observed in *NLRB* v. *Eastern Smelting, supra,* "the principle is the same." 598 F.2d at 671.

See also, *Waterbury Community Antenna, Inc.* v. *NLRB*, 587 F. 2d at 99 (2nd Cir. 1978).

In *NLRB* v. *Eastern Smelting And Refining Corporation, supra*, the First Circuit admonished the Labor Board for refusing to apply the principles of *Mt. Healthy* and *Givhan* to mixed motive discharge cases involving Section 8(a)(3) of the Act:

> "Even if the Board can meet its burden of demonstrating improper motivation, the matter does not end there. The employer may still defend by proving that there was a good reason for the discharge and that 'it would have reached the same decision . . . even in the absence of the protected conduct.' Mt. Healthy City Board of Educ. v. Doyle, 1977, 429 U.S. at 274, 287. The Board has never mentioned Mt. Healthy, let alone explained why it should be thought less serious to violate the First Amendment than the Labor Act. We have put the Mt. Healthy principle in the past in terms that, if the employer has established a good reason, it is not to be charged unless its action would not have been taken 'but for' the improper motivation, words now to be found in the penultimate paragraph of the Court's recent opinion, following Mt. Healthy, in Givhan v. Western Line Consol. School Dist., 47 LW 4102, 4104, 18 FEP Cases 1424 (1/9/79). Givhan held the employer entitled to this defense even though its improper motivation was the 'primary' one—an admitted reliance upon conduct which the Court found was constitutionally protected. However, using the Mt. Healthy and Givhan test, once the Board has shown a 'significant' improper motivation, the burden is on the employer to prove that it had a good reason, sufficient in itself, to produce the discharge." 598 F.2d at 671.

The Ninth Circuit has relied on *Mt. Healthy*, and other decisions of this Court, in support of its position that Section 8(a)(3) is not violated unless the improper mo-

tive for the discharge is the dominant or "but for" cause of the discharge. *Stephenson* v. *NLRB*, 614 F. 2d 1210, 1213 (9th Cir. 1980); (Approving the application of the *Mt. Healthy* analysis to NLRB cases.)[4]; *Western Exterminator Company* v. *NLRB*, 565 F. 2d 1114, 1118 (9th Cir. 1977). In *Western Exterminator* the Circuit Court stated the rule as follows:

> "It is a long-standing rule of law within our circuit that where a discharge is motivated by both legitimate business consideration and protected union activity, 'the test is whether the business reason or the protected union activity is the motivating cause behind the discharge'. (citations omitted). Stated conversely, 'where a party has two motives, one permissible and the other impermissible, the better rule is . . . that the improper motive must be shown to have been the dominant one." 565 F.2d at 1118.

After noting that the various circuits are sharply divided on the issue of the "quantum of animus" necessary for a Section 8(a)(3) violation, the Ninth Circuit relied on a series of this Court's decisions which hold that a discharge may be lawful even if the employer's actions are presumed to be motivated by union animus:

> "An analysis of the Supreme Court opinions in this area leads us to conclude that our position, that antiunion animus must be the dominant or moving cause, is the better rule. The Court has held that where the employer's conduct is inherently destructive of section 7 rights, unlawful motivation is presumed to exist. NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 33, 65 LRRM 2465 (1967); NLRB v. Brown, 380 U.S. 278, 287, 58 LRRM 2663 (1965); American Ship Building Co. v. NLRB, 380 U.S. 300, 311, 58 LRRM 2672 (1965); NLRB v. Erie Resistor

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[4] The opinion in *Stephenson* v. *NLRB*, *supra*, indicates that the Ninth Circuit considers the terms "dominant cause," "moving cause," and "but for" cause to be synonymous.

Corp., 373 U.S. 221, 228, 53 LRRM 2121 (1963); Radio Officers' Union v. NLRB, 347 U.S. 17, 45, 33 LRRM 2417 (1954). Even where illegal animus is presumed to exist, however, the Board need not find a violation of the Act.

> [S]uch situations [inherently destructive employer conduct] present a complex of motives and preferring one motive to another is in reality the far more delicate task, reflected in part in the decisions of this Court, of weighing the interests of employees in concerted activity against the interest of the employer in operating his business in a particular manner and of balancing in the light of the Act and its policy the intended consequences upon employee rights against the business ends to be served by the employer's conduct.

NLRB v. Erie Resistor Corp., supra, 373 U.S. at 228-29, 53 LRRM at 2124. See also, NLRB v. Great Dane Trailers, supra, 388 U.S. at 33-34; American Ship Building Co. v. NLRB, supra, 380 U.S. at 311-12.

> Thus, since in those cases where discriminatory animus is presumed to exist the Board and courts may nevertheless uphold the employer's conduct, we believe that in a case, such as the one before us, where the employer's conduct is not inherently destructive, the Board and courts, a fortiori, are not *compelled* to find a section 8(a)(3) violation where the antiunion animus is but one of multiple motivating factors." 565 F.2d at 1118 n.3.

In the present case, the Fifth Circuit erroneously adopted the "substantial factor" test utilized by the Board and ALJ. Other Circuit Courts have also held that an 8(a)(3) violation may be found even though union animus was not the "dominant" or "but for" cause of the discharge. *NLRB* v. *Montgomery Ward & Co.*,

554 F. 2d 996, 1002 (10th Cir. 1977) (partially motivated); *Oil, Chemical & Atomic Workers International Union* v. *NLRB*, 547 F. 2d 575, 590 (D.C. Cir. 1970) (motivated in any part); *NLRB* v. *Townhouse T.V. & App., Inc.*, 531 F. 2d 826, 828 (7th Cir. 1976) (motivated at least in part). This Court should grant the Petitioner's application for certiorari to resolve this important question of law [5] and to resolve the present conflict among the Circuit Courts.

Finally, we note that in *Wright Line*, 251 NLRB No. 150, 105 LRRM 1169, 1170 (1980), the Board recently abandoned the "in part" or "substantial factor" test in favor of an "analysis akin to that used by the Supreme Court in Mount Healthy. . . ." However, while purporting to abandon the "in part" test, the Board expressly refused to adopt the dominant motive test and improperly placed upon the employer the burden of proving that the Act had not been violated. *Wright Line*, *supra*, 105 LRRM at 1173-75. The Board recognized that the dominant motive test keeps the burden of proof on the shoulders of the General Counsel:

> "As has been noted, under the 'dominant motive' test it is the General Counsel who, in addition to establishing a prima facie showing of unlawful motive, is further required to rebut the employer's asserted defense by demonstrating that the discharge would not have taken place in the absence of the employees' protected activities." 105 LRRM at 1173.

However, the Board improperly shifted the burden of proof to the employer:

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[5] According to the NLRB's most recent Annual Report, 59 percent of all unfair labor practice charges filed with the Board in fiscal year 1979 alleged illegal discharge or other discrimination. Forty-Fourth Annual Report of the NLRB, 104 LRR 171, 173 (1980).

"Thus for the reasons set forth above, we shall henceforth employ the following causation test in all cases alleging violation of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation. First, we shall require that the General Counsel make a prima facie showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.[14]

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[14] In this regard we note that in those instances where, after all the evidence has been submitted, the employer has been unable to carry its burden, we will not seek to quantitatively analyze the effect of the unlawful cause once it has been found. It is enough that the employees' protected activities are causally related to the employer action which is the basis of the complaint. Whether that 'cause' was the straw that broke the camel's back or a bullet between the eyes, if it was enough to determine events, it is enough to come within the proscription of the Act." 105 LRRM at 1174-75.

Instead of resolving the existing conflict in the law, the Board's decision in *Wright Line* will only generate further litigation.

**2. The Court of Appeals Grossly Misapplied the Substantial Evidence Test when It Sustained the Board's Findings Concerning the Discharges of Ignacio Santos and Gerardo Moncivais.**

It is impossible for a discharge to be discriminatory without proof that the employer had knowledge of the employee's union activities. *Bill's Coal Company* v. *NLRB*, 493 F. 2d 243, 246-47 (10th Cir. 1975); *NLRB* v. *Garner Tool and Die Mfg. Co.*, 493 F. 2d 263, 267-68 (8th Cir. 1974); *Hackett Precision Company* v. *NLRB*, 459 F. 2d 463 (6th Cir. 1972); *Dubin-Haskill Lining Corp.* v. *NLRB*, 375 F. 2d 568, 573 (4th Cir. 1967)

(citing numerous decisions of other circuit courts). More specifically, the Board must show that supervisor responsibile for the discharge was aware of the discharged employee's union activities. *Delchamps, Inc.* v. *NLRB*, 585 F.2d 91, 94 (5th Cir. 1978); *NLRB* v. *Electro Mart*, 523 F. 2d 410, 413 (9th Cir. 1975); *Federation of Union Representatives* v. *NLRB*, 339 F. 2d 126, 128-29 (2nd Cir. 1964). As the Fifth Circuit stated in *Delchamps, Inc.* v. *NLRB, supra*:

> "[2] When the employer's agent responsible for the discharge of an employee has no knowledge at the time of the firing that the employee had been involved in union activities, it would defy logic and twist the objectives of the Act to find that the discharge violated §§ 8(a)(3) and 8(a)(1) because it was in retaliation for such activities. This Court has recognized the force of this argument by holding that, to prove a violation of these sections of the Act, the Board must show that the particular supervisor responsible for the firing knew about the discharged employee's union activities." *Id.* at 94.

Moreover, the Board's findings of employer knowledge may not rest on "suspicion, surmise, implications or plainly incredible evidence." *Amyx Industries, Inc.* v. *NLRB*, 457 F. 2d 904, 906 (8th Cir. 1972). See also, *Bill's Coal Company* v. *NLRB, supra*, 493 F. 2d at 247; *Dubin-Haskell Lining Corp.* v. *NLRB, supra*, 375 F. 2d at 573. As the Eighth Circuit stated in *NLRB* v. *Garner Tool and Die Mfg. Co., supra*, 493 F. 2d at 267-68:

> "While the Board is free to draw reasonable inferences from the evidence, direct and circumstantial (citation omitted), it may not build inferences upon inferences to reach a finding which is no more than educated conjecture."

In the present case, as the Board's opinion admits, there is no direct evidence that Garcia was aware of

Santos' union activity. Indeed, Santos testified that "I didn't tell anybody. I did everything in secret." (R. 55). The Board inferred that Garcia was aware of Santos' activities because Garcia told Martinez that he had information that some truckdrivers and kill-floor employees were involved in union activities and because Garcia asked Martinez to watch two such employees. Santos' name was not mentioned. In brief, the Board's finding that Garcia was aware of Santos' activities is based upon speculation, surmise and plainly incredible evidence. The Board piled inference upon inference to reach a conclusion that falls short of educated conjecture.

The Board's findings concerning the discharge of Gerardo Moncivais suffer from the same defect. There is no evidence that Rogelio Salinas, who made the decision to discharge Moncivais, was aware of Moncivais' Union activity. Indeed, the Board's decision admits that "there is no direct evidence of Company knowledge concerning Moncivais' Union activity". The Board infererd such knowledge "for the same reasons" it gave for inferring knowledge in connection with the discharge of Ignacio Santos. The Board also relied upon Armando Garcia's statement to Mario Moncivais that "all the Moncivaises would be discharged because they were responsible for bringing the Union in". However, that statement was allegedly made several months after Gerardo Moncivais had been discharged and cannot reasonably be relied upon to establish knowledge of Gerardo Moncivais' Union activity at the time the discharge occurred. The Board's findings that the reasons given for the discharge were a mere pretext to mask unlawful motivation are based on suspicion, surmise and plainly incredible evidence.

Whether the Board's decision is supported by substantial evidence is ordinarily a question for the Court of Appeals. However, this Court will exercise its power of review "when the standard has been misapprehended or

grossly misapplied". *NLRB* v. *Walton Mfg. Co.*, 396 U.S. 404, 408 (1962); *Universal Camera Corporation* v. *NLRB*, 474, 491 (1951). Review of the Fifth Circuit's decision upholding the discharges of Ignacio Santos and Gerardo Moncivais is appropriate under the foregoing criteria.

## CONCLUSION

For the reasons stated, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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# Appendices

## APPENDIX A

**Opinion of the Court of Appeals, September 8, 1980**

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 79-2487

NATIONAL LABOR RELATIONS BOARD,
*Petitioner,*

v.

LAREDO PACKING COMPANY,
*Respondent.*

Sept. 8, 1980

Application for Enforcement of an Order of the National Labor Relations Board

Before GOLDBERG, TATE and SAM D. JOHNSON, Circuit Judges.

PER CURIAM.

The record in this labor case reveals a rather sordid story of respondent Laredo Packing Company's attempts to obstruct its employees' efforts to organize and its actions to destroy its employees' support for their newly-certified union in the subsequent and bitter contractual negotiations. Respondent opposes the Board's petition for enforcement of its order by contending that the Board's findings of unfair labor practices—illegal acts which include fifteen discriminatory discharges, one discriminatory reduction of working hours, unilateral wage increases during contractual negotiations which had yet to reach an impasse, numerous instances of interrogation and threats regarding union activity, threats of plant closure

should the union be elected, prohibitions against the wearing of union insignia, and numerous occasions of surveillance—are unsupported by substantial evidence on the record as a whole.

We have canvassed all portions of this massive record which are relevant to the unfair labor practices before us, and we conclude that none of the Board's credibility determinations attacked by respondent is either inherently unreasonable or self-contradictory. *See, e.g., NLRB* v. *Randle-Eastern Ambulance Service, Inc.*, 584 F.2d 720, 730 (5th Cir. 1978). In short, our review of the record has led to our unwavering conviction that the Board's findings of unfair labor practices are supported by substantial evidence on the record as a whole. With particular regard to the eight truck drivers discharged due to their purported uninsurability, we rely on the Board's thorough and well-reasoned opinion reported at 241 N.L.R.B. No. 24 (1979).

Accordingly, the petition for enforcement is GRANTED.

## APPENDIX B

**Decision and Order of the National Labor Relations Board, 241 NLRB No. 24 (1979)**

241 NLRB No. 24

FJP
D—4653
Laredo, Tex.

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR REALATIONS BOARD

Cases 23—CA—6444,
23—CA—6520,
23—CA—6762, and
23—CA—6797

LAREDO PACKING COMPANY

and

AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, LOCAL NO. 171, AFFILIATED WITH AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO

### DECISION AND ORDER

On September 12, 1978, Administrative Law Judge John P. von Rohr issued the attached Decision in this proceeding. Thereafter, Respondent and the General Counsel filed exceptions and supporting briefs, and Respondent filed an answering brief to the General Counsel's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National

Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified herein.

In adopting the Decision of the Administrative Law Judge, we find that Respondent violated Section 8(a)(1), (3), (4), and (5) of the Act during and subsequent to a union organizing campaign at its plant, as a result of which its production and truckdriver employees selected the Union as their bargaining representative. As detailed in the attached Administrative Law Judge's De-

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[1] We find without merit Respondent's allegation of bias and prejudice on the part of the Administrative Law Judge. Upon our full consideration of the record and the Administrative Law Judge's Decision, we perceive no evidence that the Administrative Law Judge prejudged the case, made prejudicial rulings, or demonstrated bias against Respondent in his analysis or discussion of the evidence. Furthermore, it is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3rd Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

We note, however, that the Administrative Law Judge made certain inadvertent errors which do not affect his Conclusions of Law. In Sec. B(2) of his Decision, certain references to employee Aguilar properly were in reference to employee Mendoza. In addition, the record reveals that the Molina mentioned in sec. F should have been identified as Francisco Molina. Finally, testimony indicates that fn. 29 of his Decision should read that Mario Moncivais was hired in 1969, not 1975.

We further note that the Administrative Law Judge inadvertently omitted Ignacio Santos' name from among those employees who are entitled to immediate and full reinstatement, enumerated in par. 2(a) of his recommended Order. We shall include same.

cision, Respondent discriminatorily discharged 15 of its employees and reduced the hours of another; unilaterally granted wage increases during negotiations although no impasse had been reached;[2] and on numerous occasions interrogated and threatened employees regarding their union activity and that of others, threatened to close the plant if employees supported the Union, prohibited them from wearing union insignia, and created the impression of surveillance of their union activities. We also adopt the Administrative Law Judge's dismissals of those allegations regarding the discharge of Juan Aguilar, increased workloads and reduced hours for certain drivers, and the alleged unilateral modification of the contractual seniority provision.[3]

In the underlying Decision, the Administrative Law Judge found, *inter alia*, that Respondent violated Section 8(a)(1) and (3) of the Act by discharging a group of eight named truckdrivers in April or May 1977. While we agree, for the reasons set forth in the Administrative Law Judge's Decision, that Respondent's discharge of these truckdrivers was discriminatory, a close examination of the record reveals additional factors lending further support for the conclusion reached by the Administrative Law Judge.

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[2] In adopting the finding that Respondent unilaterally granted a wage increase in violation of Sec. 8(a)(1) and (5) of the Act, we shall modify the Administrative Law Judge's recommended Order to provide that Respondent shall not be authorized or required by our Order to withdraw or eliminate any wage increase presently enjoyed by Respondent's employees.

[3] In adopting the Administrative Law Judge's dismissal of the alleged unilateral modification of the seniority provision, we do not rely on the rationale in fn. 47 of his Decision, as the references made therein were with regard to his findings concerning allegations of discriminatory activity and therefore entailed considerations immaterial to an alleged unilateral modification of a contractual term.

As detailed by the Administrative Law Judge, each of the eight terminated drivers had previously engaged in union activity, including attending union meetings and signing union authorization cards. Several had also visited the homes of other employees, soliciting them to sign authorization cards. That Respondent became aware of this activity is amply revealed by testimony relating to Armando Garcia, one of Respondent's supervisors with authority over the truckdrivers. During the election campaign he interrogated several drivers with respect to their union activities and that of others. During one interrogation he specifically requested information from driver Oscar Martinez regarding the activities of two drivers who were subsequently included in the group discharged. At the time, he offered the routes of these two drivers under suspicion to Martinez. Furthermore, during the interrogation of another driver, Jamie Galvan, Garcia stated that he had heard the truckdrivers were responsible for bringing in the Union. The testimony of Martinez indicated that Garcia continued to seek such information at least as late as April 1977.

Having acquired such knowledge of union activity, Garcia's conspicuous and repeated expression of animus toward the Union is especially significant in view of his pivotal role in the management of Respondent's operations. Far from being a low-level supervisor in limited contact with those who establish policy, Garcia's authority was second only to that of the three Salinas brothers who were the executive officers in control of the enterprise. At the time of the events herein, he was the sales manager, was in charge of all the supervisors and truckdrivers, and could hire and fire the overall personnel. In fulfilling such duties, he involved himself in repeated instances of discriminatory misconduct. He discriminatorily discharged Rodrigo Gaona, a production employee. He threatened to fire maintenance employee Manuel Olivares, whose hours were subsqeuently discrimina-

torily reduced. He told Ignacio Santos, another discriminatee, that there was no work for him because he was not dependable, which reason is found to be pretexual. Subsequent to the election, he told truckdriver Mario Moncivais early in April that, because of the Union, he was going to fire all the Moncivaises[4] along with the truckdrivers. On April 17, Garcia repeated this threat when he told Oscar Martinez, upon learning that Martinez had attended a union meeting, that Martinez was now on his "list' with the other truckdrivers and that, if there were any changes, for him not to get his hopes too high. On the same day he accused truckdriver Macias of pushing the rest of the truckdrivers to join the Union, and that he should get himself straight or be faced with some trouble.

Significantly, Garcia's animus toward the drivers who supported the Union was not limited to the period prior to the discharge of these eight at the end of April 1977. After truckdriver Galvan was terminated, he was told by Garcia, "That's what you get for going with the Union people." In view of Garcia's position with Respondent we cannot conclude that this admission of discriminatory motive was unrelated to Respondent's decision to terminate the drivers.

In view of the above, the Administrative Law Judge correctly found that absent such antiunion motivation, Respondent would not have discharged these drivers so promptly after receiving the April 26 letter from its insurance agent announcing the exclusion of these drivers from insurance coverage without, at the very least, having taken some further action to retain them. Out of a complement of 18-20 drivers, Respondent was faced with a sudden announcement that approximately half of them would no longer be insured. Upon receipt of the letter,

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[4] The record reveals that at the time threre were five related Moncivaises employed by Respondent, including three truckdrivers.

the evidence reveals that Roberto Salinas immediately told Garcia to notify the drivers of their discharge. Garcia testified that among those to be excluded were its two best drivers and that the situation made him a little bit panicky. Further cause for his concern is shown in his testimony that the orientation process of a new driver takes about a month, in part due to the training necessary regarding the proper handling of meat, and in part in order to determine if the employee was willing to perform the necessary tasks involved in the transport of the meat. He estimated that for each 10 applicants only 1 or 2 were retained. It is therefore evident that the drivers could not readily be replaced and that their termination severely reduced Respondent's number of drivers.

The Administrative Law Judge found that the evidence did not support a finding of collusion between Respondent and its insurer, and no exceptions have been filed with respect to this finding. However, it does not automatically follow therefrom that Respondent had no recourse but to terminate these drivers immediately. One clear alternative would have been to contact the insurance agent and see if any mistakes might have been made or if alternate insurance might have been available at additional cost or with another carrier.[5] That such an alternative presented itself to Respondent is manifest, inasmuch as Garcia testified that he told Alfredo Moncivais, one of the discharged drivers, that Respondent was going to check and see what could be done about the insurance.[6] However, the record is devoid of any evidence that Respondent actually made any inquiries regarding con-

[5] Copies of documents acknowledging the exclusion of drivers from insurance coverage reveal that Respondent had changed insurance carriers from Associated Indemnity Corporation to National Surety Corporation, sometime between 1975 and 1977.

[6] Another discharged driver, Macias, testified that he had received similar assurances from Garcia.

tinued insurance for these drivers. The fact that in the past Respondent might have accepted the exclusion of a couple of drivers a year does not automatically render Respondent's acquiescence nondiscriminatory, particularly as the exclusion of the eight drivers would have had such a pronounced impact on its work force of drivers.

That Respondent was not concerned whether the insurance carrier might have made a mistake in deciding to exclude any of these drivers is revealed by the testimony Roberto Salinas, Respondent's president and the person to whom the April 26 letter was addressed. Salinas flatly stated that he did not get involved in the formula used to determine which drivers were to be excluded from coverage. Consistent with this position, Salinas, upon recepit of the letter, promptly instructed Garcia to notify the drivers of their termination.

Even a cursory examination of the driving records of these drivers would have raised serious questions as to the propriety of their exclusions. It appears from the testimon of driver Macias that the insurance carrier counted the entry of an accident on a driving record as the equivalent of two tickets, regardless of whether the driver was issued a ticket as a result of the accident. Using this formula, the evidence shows that at the time of their exclusion, the truckdrivers each had the equivalent of five to seven entries on their driving records[7] for the period between March 1974 and March 1977, shortly before their discharge. However, it appears that the records of most of these drivers had not significantly changed during the previous year. The records in evidence clearly indicate that in the 2-year period between March 1974 and March 1976, five of the alleged discriminatees had the equivalent

[7] The evidence establishes that the driving records of those employees introduced in evidence were either copies or orginals of those enclosed with the April 28 letter and were relied on by the insurance company.

of at least five entries.[8] Juarez' record shows that he had received no tickets for the entire year prior to March 1977. Therefore it appears that five of the eight drivers had been driving for periods in excess of a full year with records that suddenly were found by the carrier to be sufficient to warrant exclusion from insurance coverage. That the insurance carrier might have modified its formula for excluding drivers and thereby acted more restrictively in 1977 than it had previously is not a defense available to Respondent, as there is no evidence of such a change in the record and, in any event, there is no evidence that Respondent sought to inquire regarding the exclusion of drivers whose records were no worse than those of drivers who were not excluded the previous year. Furthermore, with respect to insurance policy LC 255 05 10 issued by National Surey Corporation to Respondent, it appears that Respondent on two occasions signed forms acknowledging the exclusion of drivers, Martinez and Alfredo Moncivais from coverage, yet the evidence shows that these two employees were notified of their exclusion only once, in late April. Why the insurance company might have sought to exclude two drivers at one time and eight at another time under a single insurance policy has not been explained by the record, and there is no evidence that Respondent attempted to acquire such an explanation.

In agreement with the Administrative Law Judge, we find that Respondent's May 5 agreement with Union Representatives Erbey Rendon to rehire the discharged truckdrivers does not constitute proof that Respondent acted nondiscriminatorily when it discharged the truckdrivers. While it is apparent that offers to reinstate the drivers in alternate positions might have a bearing on Respondent's obligation to reinstate the drivers and compensate

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[8] As there is no evidence of these drivers' records during the year prior to March 1974, it is possible that their records might have contained additional violations for the preceding year.

them for their losses, it does not absolve Respondent of all responsibility for a prior discriminatory discharge. In any event, it was admitted at the hearing that these employees were offered positions that generally paid less than what they had been receiving as truckdrivers. Furthermore, it appears that of the four employees who acknowledged that they received reemployment offers, two were off work for at least 2 weeks and the other two were not reassigned until about 4 weeks after their notice of termination. While it appears that the Administrative Law Judge did not expressly consider the evidence which conflicts with the testimony of the remaining four drivers that they never received offers of reinstatement, even assuming Respondent had subsequently offered these drivers other positions, we find that, for the reasons stated above, the initial termination of the drivers was discriminatorily motivated and violative of Section 8(a) (3) and (1) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge as modified below, and hereby orders that the Respondent, Laredo Packing Company, Laredo, Texas, shall take the action set forth in the said recommended Order, as so modified:

1. Add the following to paragraph 1(g):

"provided, however, that nothing in this Order shall be construed as authorizing or requiring the Respondent to withdraw or eliminate any wage increase presently enjoyed by Respondent's employees."

2. Substitute the following for paragraph 2(a):

"(a) Offer to employees Daniel Mendoza, Rodrigo Gaona, Ignacio Santos, Gerardo Moncivais, Felix Rodriquez, Oscar E. Martinez, Alfredo Moncivais, Samuel

Medina, Jr., Jose Escanilla, Jamie Galvan, Jr., Gregoria Juarez, Jr., Abel Hinojosa, Juan Ramon Macias, Mario Moncivais, and Jose Villarreal immediate and full reinstatement to their former jobs or, if these positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, and make them whole for any loss of wages and earnings they may have suffered in the manner set forth in the section of this Decision entitled The Remedy."

3. Substitute the attached notice for that of the Administrative Law Judge.

IT IS FURTHER ORDERED that the complaint allegations not specifically found herein be, and they hereby are, dismissed.

Dated, Washington, D.C. March 19, 1979

JOHN H. FANNING, Chairman

HOWARD JENKINS, JR., Member
NATIONAL LABOR RELATIONS BOARD

[SEAL]

MEMBER PENELLO, dissenting in part:

My only quarrel with my colleagues' decision concerns their finding that Respondent violated Section 8(a)(3) and (1) of the Act when it discharged eight truckdrivers after it received notification from its insurance agent that they had become uninsurable. The majority's conclusion that these employees were unlawfully terminated is erroneous because the record simply does not support a finding of a casual connection between Respondent's union animus and the discharges.

The key facts are not in dispute. Thus, it is uncontroverted that in late April 1977 Respondent received a letter from its insurance agent which stated that the eight alleged discriminatees were excluded from insurance coverage. Immediately thereafter, Respondent terminated the eight drivrs. The Administrative Law Judge stated that "the evidence does not . . . support a finding of collusion between Respondent and its insurer,"[9] and no exception has been filed on this ground. Further, the Administrative Law Judge found, as my colleagues acknowledge, that "[i]nsofar as past practice is concerned, the evidence reflects that in the past Respondent terminated other drivers upon receiving notice of their uninsurability."[10] Therefore, this is not a case of disparate treatment. In addition, Respondent's subsequent actions suggest that the discharges were not discriminatorily motivated. In this regard, the Administrative Law Judge found that four of the eight truckdrivers were offered other jobs. Concerning the remaning four, the majority concedes that there is testimony indicating that they, too, were offered other positions.

My colleagues nevertheless hold that the discharges were caused by the employees' union activities, rather

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[9] Fn. 33 of the ALJD.

[10] *Id.*

than the independent action of the insurance carrier. The majority states that "Respondent's acquiescence" in the decision of the insurance company was unlawful because a "clear alternative would have been to contact the insurance agent and see if any mistakes might have been made or if alternate insurance might have been available at additional cost or with another carrier." However, whether or not Respondent exercised good business judgment in failing to protest the determination of the insurance company is not the issue before us. Where, as here, "the employer has proper cause for discharging an employee, the Board may not rely on scant evidence and repeated inferences to make a finding that places the Board in the position of substituting its own ideas of business management for those of the employer." *Golden Nugget, Inc.*, 215 NLRB 50, 53 (1974), quoting from *N.L.R.B.* v. *Blue Bell, Inc.*, 219 F.2d 796, 798 (5th Cir. 1955).

On the basis of the facts presented, it is clear to me that the eight truckdrivers were discharged because of the action taken by the insurance carrier and not because of Respondent's antiunion attitude. I would therefore dismiss the complaint insofar as it alleges the termination of these employees to be violative of Section 8(a)(3).

Dated, Washington, D.C. March 19, 1979

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JOHN A. PENELLO, Member

NATIONAL LABOR RELATIONS BOARD

## APPENDIX

## NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT discharge our employees, or reduce their hours, or in any other manner discriminate against them because they engage in union activities or support Amalgamated Meat Cutters and Butcher Workmen of North America, Local No. 171, affiliated with Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, or any other union.

WE WILL NOT interrogate our employees concerning their union activities or the activities of other employees.

WE WILL NOT threaten to close our plant if the employees join or support the Union or engage in union activities.

WE WILL NOT threaten to discharge our employees because of their union activities or support of the Union.

WE WILL NOT create the impression of surveillance of the union activities of our employees.

WE WILL NOT prohibit employees from wearing union insignia at the plant.

WE WILL NOT unilaterally grant wage increases to our employees during bargaining negotiations without consultation or agreement with the Union; provided, however, that nothing herein shall be construed as authorizing or requiring us to withdraw

or eliminate any wage increase presently enjoyed by our employees.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act, as amended.

WE WILL offer to the employees listed below immediate and full reinstateemnt to their former jobs or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, and give them backpay, plus interest, as set forth in the Decision of the Administrative Law Judge.

| | |
|---|---|
| Daniel Mendoza | Jaime Galvan, Jr. |
| Rodrigo Gaona | Gregorio Juarez, Jr. |
| Ignacio Santos | Abel Hinojosa |
| Gerardo Moncivais | Juan Ramon Macias |
| Felix Rodriquez | Mario Moncivais |
| Oscar E. Martinez | Jose Escamilla |
| Alfredo Moncivais | Jose C. Villarreal |
| Samuel Medina, Jr. | |

WE WILL make Manuel Olivares whole for any loss of earnings he may have suffered by reason of the discrimination practiced against him.

LAREDO PACKING COMPANY
(Employer)

Dated ———— By ————————————
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, One Allen Center, Rm. 920, 500 Dallas Avenue, Houston, Texas 77002, Telephone 713-226-4722.

JD—602—78
Laredo, TX

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

Cases 23—CA—6444
23—CA—6520
23—CA—6762
23—CA—6797

LAREDO PACKING COMPANY

and

AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, LOCAL NO. 171, affiliated with AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO

*Guadalupe Ruiz, Esq.*, for the General Counsel.

*Ben F. Foster, Esq.*, and *John F. Mann, Esq.*, for the Respondent.

*Frank Herrera, Esq.*, and *Mr. Erbey Rendon, Financial Secretary*, for the Charging Party.

## DECISION

### Statement of the Case

JOHN P. von ROHR, Administrative Law Judge: Pursuant to charges, duly filed, the General Counsel of the National Labor Relations Board, herein called the Board, by the Regional Director of the Twenty-Third Region (Houston, Texas), issued a series of complaints against Laredo Packing Company, herein called the Re-

spondent or the Company, alleging that it had engaged in certain unfair labor practices in violation of Section 8(a)(1), (3), (4) and (5) of the National Labor Relations Act, as amended, herein called the Act.[1] The Respondent filed answers denying the allegations of unlawful conduct alleged in the complaints.

Pursuant to notice, a hearing was held before the undersigned in Laredo, Texas, on August 23, 24, 25 and 26, 1977, on January 17, 18, 19 and 20, 1978, and on February 28, March 1 and March 2, 1978. Briefs were received from the General Counsel and the Respondent on June 20, 1978, and they have been carefully considered.

Upon the entire record in this case, and from my observation of the witnesses, I hereby make the following:

## I. The Business of the Employer

The Respondent is a Texas corporation with its plant and principal place of business located in Laredo, Texas, where it is engaged in the business of the slaughter, processing and packaging of meat products.

During the 12 months preceding the hearing, Respondent purchased and received goods and materials from points and places located outside the State of Texas valued in excess of $50,000. Respondent concedes, and I find, that it is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

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[1] The charge in Case 23-CA-6444 was filed on March 22, 1977. A complaint and an amended complaint in this case issued on May 24, 1977, and August 19, 1977, respectively. The charge in Case 23-CA-6520 was filed on May 16, 1977, and the complaint issued on June 27, 1977. A charge and an amended charge in Case 23-CA-6762 was filed on October 5, 1977, and November 1, 1977, respectively. The complaint issued on December 16, 1977. The charge in Case 23-CA-6797 was filed on November 9, 1977, and the complaint in this case issued on December 16, 1977.

## II. The Labor Organization Involved

Amalgamated Meat Cutters and Butcher Workmen of North America, Local No. 171, affiliated with Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

## III. The Unfair Labor Practice

### A. *The Issues; Background*

Apart from a host of alleged independent violations of Section 8(a)(1) of the Act, the consolidated complaints in this case, as they were from time to time amended, charge Respondent with having engaged in various types of discrimination against some 20 named individual employees, all alleged to have been violative of Section 8(a)(3) of the Act. One employee is alleged to have been discharged in violation of Section 8(a)(4) of the Act; and finally, it is alleged that Respondent made certain unilateral changes in violation of Section 8(a)(5) of the Act.

To briefly state the background in this case, the Union commenced an organizing campaign, chiefly among Respondent's kill-floor and truckdriver employees, on or about November 4, 1976. After considerable organizing activity, a representation petition was filed on November 26, 1976. An election was held on January 6 and 7, 1977, with the result that out of approximately 154 eligible voters, 91 voted for the Union and 37 against. Following certification on January 21, 1977, the parties engaged in bargaining and eventually executed a collective-bargaining agreement on September 9, 1977.

I shall state at the outset that, as evidenced by Respondent's conduct in engaging in numerous acts independently violative of Section 8(a)(1) of the Act as hereinafter set forth, the record clearly demonstrates that

Respondent was hostile to the Union. To avoid repetition, however, I shall not attempt to describe all of this conduct in any single preliminary section of this Decision. Rather, since the conduct occurred at various times and involved various different supervisors and employees, this conduct will be described during my recitation and consideration of the various individual cases of the alleged discriminatees herein. Moreover, it should be borne in mind that I have taken into account the sum total of Respondent's antiunion conduct as relevant evidence pertaining to the individual cases of alleged discrimination, and it has been so considered.

The acts of alleged discrimination which are alleged to have occurred at various times between January 3, 1977, and September 1977 are set forth below in chronological order.

### B. *The Discharges of Daniel Mendoza and Juan Aguilar on January 3, 1977*

#### 1. The Facts

Daniel Mendoza was employed in Respondent's maintenance department under the supervision of Mateo Veliz from October 1970 until his discharge on January 3, 1977. An active union supported, Mendoza passed out union cards at homes of other employees and at the plant locker rooms, and attended six union meetings during November and December, 1976.

On about November 21, Veliz aproached Mendoza and, in the presence of two other employees, told Mendoza, "I know that you are passing out union cards. And if I catch you at it I'm going to fire you." Veliz also stated that Roberto Salinas, Respondent's president, has told

him that if the Union won, the Company would have to close its doors.[2]

Juan Aguilar, who also worked in the maintenance department under Veliz, was employed by Respondent from June 1976 to January 3, 1977. Aguilar attended union meetings held in November and December and distributed union cards in the dressing rooms during his lunch breaks.

Veliz approached Aguilar at the timeclock during the last week of November and asked if he had signed a union card. Aguilar said that he had. About a week later Veliz asked Aguilar if he knew how many employees had signed union cards. Aguilar replied that a majority had signed. When then asked to identify other who were passing out cards, Aguilar stated that he had been told not to say anything. Veliz thereupon stated, "Do you understand that we could fire you for participating?" Aguilar responded that if he was going to be fired there was nothing he could do about it.[3]

Turning to the circumstances of the discharges, it is undisputed that Veliz had scheduled the maintenance Department employees (approximately 10) to work on New Year's Eve, December 31, the hours of this shift being from 3 p.m. to 11 p.m. Aguilar, however, testified that he had asked Veliz on December 15 if he could be off

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[2] The credited testimony of Mendoza, the specifics of which are undenied. Concerning the subject of the Union, Veliz testified only that on one night when the campaign started he called a meeting of his employees and told them that they did not have to join the Union to be sure of their jobs and that they would keep their jobs regardless of whether the Union won or lost. Other than this, he testified only that, "I never called any other meeting and the subject was never again discussed or talked about." As indicated, I credit the testimony of Mendoza which I do not believe to have been fabricated.

[3] Credited testimony of Aguilar. See the preceding footnote, which is also applicable here.

on December 24 and December 31 and that Veliz had said yes, if he would remind him a few days before. Aguilar further testified that he reminded Veliz a few days before the 31st and that Veliz then authorized him not to work on the 31st.

Aguilar and Mendoza came to the plant at about 10 a.m. on December 31 to pick up their paychecks. Although they did not come together, they arrived at the same time. The record reflects that both employees sought to talk to Veliz and ask for permission to be off on New Year's Eve, but that they could not see him because he was on the kill floor and plant rules prohibited them from going to him there. These employees then went to Pedro Garza, an inspector. It is noteworthy, however, that not only were employees instructed to see Garza when Veliz was busy, but that Garza was also authorized (and did) sign written reprimands that were issued to employees. In any event, Mendoza and Aguilar spoke to Garza individually. Mendoza testified that he asked to be off that day because his wife was not well and he had to take her to a doctor. Garza replied, he said, that it would be all right and that he would let Veliz know. Aguilar testified that when he spoke to Garza he reminded him to tell Veliz that he would be off that day, and that Garza said it would be all right. Concerning this occasion, Garza testified that Mendoza and Aguilar came to him and said they were not going to work that day. He said he told them to see Veliz, but they said they had already seen him and he had not given them permission not to work. Garza testified that when he then told them they should come to work, they said that they would not come in anyway. Garza responded, he said, by stating that he would tell this to Veliz.

Mendoza and Aguilar did not report to work for the New Year's Eve shift. When they next reported to work on January 3, 1977, they found their timecards missing

and were told by Veliz that they were discharged for not having worked on December 31. They then went to Rogelio Salinas, Respondent's vice president, to appeal their discharge. Salinas, however, sustained the action of Foreman Veliz.

2. Conclusions as to Mendoza

Although the cases of Mendoza and Aguilar appear to be largely similar, the fact is that there are material differences which compel me to treat them separately and to arrive at different conclusions.

Unlike the case of Aguilar, who asserted that he had previously been granted permission to be off, it is evident that Mendoza had planned to work on December 31 but for the unexpected occasion of his pregnant wife feeling ill that morning. Although vigorously cross-examined on the subject, Aguilar credibly detailed the occasion of taking his wife to see a doctor in Nuevo Laredo later that day. Under the circumstances, I am persuaded that Aguilar had a valid reason to be off work that day and that he so explained this, in the absence of Veliz, to Garza, whom I find was authorized to receive messages of this type. Upon the entire record in this case, I am convinced and find that Mendoza was terminated because he was known by Respondent to be a union supporter. As previously noted, this was evidenced by Veliz' telling Mendoza that he knew that Mendoza was passing out union cards and that he would fire him if he caught him in this activity. Respondent has a large turnover of employees.

Employed since 1970, Mendoza was one of Respondent's most senior and experienced employees in his department. And as he told Rogelio Salinas at the time of his discharge, he had never before been punished or reprimanded in any way. Indeed, the record reflects that other employees who had been absent without authorization had

received warnings or other penalties, but were not discharged. Not only did Mendoza have a valid reason for being off, but Respondent was apprised of this reason. Under all these circumstances I have no hesitation in finding that this senior employee would not have been discharged for his December 31 absence but for his union activities. Accordingly, I find that Respondent's discharge of Mendoza was in violation of Section 8(a)(3) and (1) of the Act.

3. Conclusions as to Aguilar

Aguilar admittedly wished to be off New Year's Eve to be with his family. While this is understandable, the fact is that this was no emergency. Veliz found it necessary to schedule all the employees on this shift to work their regular hours, which was up to 10 p.m. No doubt the others also would have wished to be off that evening.

As noted, Aguilar testified that in mid-December he requested and received permission to be off on December 24 and December 31. Stating that Veliz asked to be reminded, Aguilar testified that he so reminded Veliz about 2 days before December 31 and that Veliz again assented to his request that he be off.

Veliz testified that upon determining that the employees would have to work New Year's Eve, he talked it over with the employees and that they came to an agreement that "we would work harder that night to finish early enough to have time to celebrate." Veliz further testified that Aguilar asked permission to be off that night because he wanted to celebrate, but that he refused and told Aguilar that if he gave him time off that evening he would have to give it to the others also. Aguilar then stated, he said, that he would take the time off anyway because he would not be the only one who would not report for the shift. Although I do not credit all Veliz'

testimony, I do credit it in this instance.[4] Finding then, as I do, that Veliz finally denied Aguilar's request to be off on December 31, this is a case where this employee deliberately refused his foreman's instruction that he report to work. Under the circumstances, and notwithstanding that Aguilar was also a union supporter who earlier had been unlawfully threatened with discharge, I am impelled to find that Aguilar, a relatively new employee, was terminated for deliberate disregard of the foreman's instruction that he report to work. Unlike Mendoza, Aguilar did not have a valid reason for not reporting to work with all the others in his department. Moreover, this was an aggravated situation which undoubtedly gave the foreman no little concern; for, as Veliz testified, "I had a little pressure from the other employees . . ." because of the absences that night. As has been frequently stated, union activity cannot immunize employees from discharge for cause. Accordingly, and in view of all the foregoing, it is recommended that the allegation in the complaint as to Aguilar be dismissed.

4. The Section 8(a) (1) Violations

In accordance with the facts heretofore found with respect to Mendoza and Aguilar, I find that Respondent independently violated Section 8(a) (1) of the Act by Veliz' statement that these employees could or would be fired for passing out union cards or for engaging in union activities, his telling Mendoza that Respondent's president had indicated that the Company would close its doors if the Union won, and his interrogation of Aguilar concern-

[4] Even assuming Veliz had earlier granted Aguilar permission to be off for this occasion, I credit his testimony that he denied permission when it was finally decided that all the employees would work on December 31. Moreover, if Aguilar in fact had received final permission just 2 days earlier, it seems somewhat peculiar that he would seek him out again when he came to the plant on the morning of December 31 for further confirmation.

ing his union activities and the union activities of other employees.

C. *The Discharge of Ignacio Santos*

Except for an 8-month period in 1975, Santos was employed on the kill floor from September 1968 until he was terminated on January 17, 1977. His supervisors were Ernesto Martinez and Azael Gonzales, the latter being the higher supervisor.

Santos was the initiator of the union campaign and thereafter remained one of the chief organizers. Thus it was Santos who, on November 4, 1976, first contacted Union Representative Erbey Rendon after discussing the possibility of organizing a union with other employees. Shortly thereafter he conducted a union meeting at the home of Indolcio Garcia, at which time he passed out union authorization cards. During the months of November and December he passed out approximately 85 union cards, this activity having occurred at various times at employees' homes, in the Company parking lot and at the plant during break periods. During this period he also held several union meetings at his home. It should be noted here that some of this activity, including plant visitations, occurred while he was out due to an injury during portions of this period.

It is undisputed that Santos injured his back on October 4, 1976, while attempting to lift a 300-pound drum of powder used to clean tripe. He nevertheless kept working until October 14, at which time the injury compelled him to see a doctor. At this time, with the permission of his foreman, Santos left work to see a doctor and remained out until October 31. Returning to work on November 1, he worked that day but again experienced difficulty with his back. With the permission of his foreman, he took off work on November 2 and remained out until November 13. Returning on November 13,

Santos worked until December 8 at which time, again with Respondent's permission, he again took off due to the condition of his back injury until December 31. During this period his doctor referred him to a specialist who in turn referred him to a rehabilitation center for 6 weeks of treatment. On January 14, 1977,[5] Santos was advised by his doctor that he could report back to work the following day, but gave him a note stating that he should be assigned to light duty. Santos went to the plant on January 15, 1977, a Saturday, and at this time spoke to his supervisors, Ernesto Martinez and Azael Gonzales, who, according to Santos' unrefuted testimony, told him to report back to work on Monday, January 17. Santos did so and came to work that morning. However, upon reporting to Martinez, Martinez advised Santos that the Company did not have any more work for him because he was not a dependable person. When Santos asked why he was considered to be undependable, Martinez responded that it was because he left the job any time he wanted to. According to Santos' undenied testimony, he responded by telling Martinez that this was a lie because every time he left the job he did so with his [Martinez'] permission and that he had never before been reprimanded by anyone at the plant. Santos then left Martinez and went to see Azael Gonzales. Gonzales said that he could not speak to him about the matter. He then went to Pedro Garza [a disputed supervisor] who told him the same thing. He next went to President Roberto Salinas. Santos testified that he "explained his condition" to Salinas, but that Salinas told him to see Armando Garcia. Armando Garcia, about whom much more shall be said, is Respondent's sales manager but also exercises, next to the President, top supervisory authority over the truckdrivers and pro-

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[5] The record, including Respondent's Exhibit 14, is unclear as to whether or not Santos reported back on December 31, 1976. In any event, he appears to have been off for about the first 2 weeks in January 1977.

duction employees. In any event, upon seeing Garcia pursuant to Salinas' instructions, Santos testified that Garcia told him that there was no work for him because he was not dependable. Santos testified that he thereupon pled with Garcia not to let him go because he had a large family. He also named two other employees who had been hurt on the job but were still employed. Garcia nevertheless said that he had no work for him. With this Santos was terminated.

Although Santos was responsible for initiating the union campaign and was the leading adherent and organizer prior to his termination, there nevertheless is no direct evidence of Company knowledge. Aside from the merits, Respondent raises this as a defense to Santos' case. Upon the entire record, however, there is ample evidence to warrant the inference that Respondent in fact did obtain knowldge that Santos was a union supported. Thus, as is noted throughout this Decision, the evidence reflects that Respondent engaged in numerous coercive acts against its employees, these including not only interrogation of individual employees as to their union activities, but also as to their knowledge of the *union activities of other employees.* Armando Garcia, who discharged Santos, particularly involved in this type of conduct. Of the many such incidents, a case in point is Garcia's interrogation of Oscar Martinez, a truckdriver, in late November 1976. Thus Martinez credibly testified that on this occasion Garcia broached him and stated that he had information that several truckdrivers and kill-floor employees were involved with union activities and asked if he knew anything about it. When Martinez replied that he did not, Garcia asked Martinez if he knew of anying passing out union cards or supporting the Union to let him know. Martinez replied that if he found anything out he would let him know. During the conversation, Garcia particularly told him to keep an eye on employee Alfredo Mocivais and Gregario Juarez

and to let him know if they were involved.[6] Furthermore, and as discussed later in this Decision, Garcia told some employees that he had a list of the union employees. Accordingly, and in view of all the foregoing, Company knowledge is clearly inferable and I so find.

Upon the entire record, I find that Respondent's discharge of Santos was in violation of Section 8(a) (1) and (3) of the Act. My reasons for so finding are several In the first place, the reasons given to Santos for his termination, as well as those advanced at the hearing, are inconsistent and contradictory and therefore indicative of a discriminatory motive. Thus, it will be recalled that Santos testified, without denial, that upon returning to the plant on January 15 he was told by both of his foremen, Martinez and Gonzales, that he was to report to work the following Monday. It seems reasonable to assume that these departmental supervisors would be in a position to know whether there was work available for him or not. Suspicious in itself is that Gonzales would not talk to him when he reported on Monday. Beyond that, however, at the hearing Armando Garcia testified that one of the reasons for not puting Santos back to work was that "we didn't have no opening, because we had to hire somebody else to do his work." Not only is this inconsistent with the instruction earlier given to Santos by the foremen that he report to work on Monday, but it is inconsistent with the other reasons given by Respondent's supervisors for terminating Santos, namely, that he missed too much work, that he was not dependable and finally (as Garcia asserted at the hearing) that he was

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[6] It is interesting to note that at this point Garcia, who had previously been married to Martinez' sister, did not suspect that Martinez was also a union supporter. How he eventually found out that he was will be related later in this Decision.

"too accident prone." [7] The fact of the matter is that Respondent adduced no evidence whatsoever to refute Santos' testimony that he was injured on the job and that his subsequent excused absences were due solely to the fact that the injury persisted and that at all such times he remained under a doctor's care. Neither is there evidence to sustain Garcia's contention that Santos was accident prone, since Respondent's own records reflect that Santos previously had sustained only one other injury which kept him off work, this having occurred on March 25, 1976. His record in this respect was otherwise clear ever since his hire in September 1968. Apart from the foregoing, not only was Santos one of Respondent's most senior and experienced employees, but Respondent regarded him so highly that in 1975 it sent him on a special out-of-town assignment to train other employees in all aspects of slaughtering operations. Yet, as Santos told Garcia during the discharge conversation, Respondent accommodated at least two other employees (Alfonso Aguilar and Ramon Pena) who had been injured by assigning them to lighter duties.[8] The fact that it did not likewise accommodate this valued employee can be but regarded as another indicia of discriminatory motivation.

In sum, and for all the reasons stated above. I find that Santos was discharged in violation of the Act. I further find that Respondent violated Section 8(a)(1) of the Act by Garcia's interrogation of Martinez concerning his union activities and the union activities of other employees and by his telling Martinez to keep an eye on Alfredo Moncivais and Gregario Juarez.

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[7] In addition, Garcia testified ". . . his supervisor thought that he was just pulling a fast one, and he was doing it to collect Workmen's Comp."

[8] Santos also showed Respondent's supervisors a note from his doctor requesting that he be assigned to lighter work.

D. *The Discharge of Rodrigo Gaona*

Rodrigo Gaona was employed at various times either in Respondent's boning room or on the kill floor from June 1974 to January 24, 1977. Without relating all of the details, I shall state at the outset that at times Gaona's testimony was confused and uncertain. On balance, however, the facts of Gaona's case are relatively simple and the chronology of events, as set forth in the record, eventually becomes clear. More importantly, a crucial conversation with his supervisor, Azael (Pacho) Gonzales, and the event which immediately followed, is undenied.

Gaona attended several union meetings, including the first which was held on November 4, 1976, at which time he also signed a union card. The critical conversation occurred on November 11, 1976, concerning which Gaona credibly and unrefutedly testified as follows: [9]

> As I was punching my card to get off for my lunch hour, he [Azael Gonzales] called me, and he asked me if I knew anything about the Union, and I told him that I knew about it, that I had already signed a card.
>
> And he asked me why I had done that, why had I signed this card, why had I joined the Union since they had helped me, taking me from this cold storage room where I used to work because I was hurt in my arm. He asked me why did I turn my back on the Company since they had helped me that way. And he told me that as a result of this, I was going back into this cold storage room—place.
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> That's all I remember.

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[9] Gaona's testimony concerning this conversation was also corroborated by employee Isaac Jaimes.

Gonzales' reference in the above conversation to the favor Respondent granted to Gaona referred to the fact that in May 1976 Gaona requested to be transferred from the boning department to the kill floor because of an arthritic pain in his arm. This condition was aggravated due to the cold temperature in the boning department; the kill floor was not as cold. At that time Respondent grant Gaona's request and transferred him to the kill floor. In any event, it is undisputed that about 3 days after Gaona's conversation with Gonzales on November 11, Gaona was transferred back to the boning department.

After working in the boning department for about 2 months, Gaona again began to suffer from the same arthritis. Upon being examined by a doctor on January 14, 1977, the doctor wrote the Respondent a letter stating that in his opinion Gaona should not continue to work in a cold environment.

After working in the boning department another week, Gaona finally showed the doctor's note to Gonzales on January 24, 1977. Gonzales referred him to Armando Garcia. Upon reading the note, Garcia told Gaona that he had no more work for him and with this, Gaona was terminated. Garcia, however, contacted Gaona on the following day and stated that he would have to bring a statement from the doctor stating that he was well and could work in cold places. For obvious reasons this was not accomplished and Gaona remained terminated.

Stated briefly, the crux of Gaona's case was Respondent's prompt implementation of Supervisor Gonzales' statement to Gaona on November 4, 1976, after interrogating Gaona and learning from him that he had signed a union card, that he would be transferred to the boning department. It hardly need be said that this undenied conduct

constitutes direct evidence of unlawful discrimination. Accordingly, I find that not only was Gaona's transfer to the boning department on or about November 14, 1976, violative of the Act,[10] but it follows and is reasonable to assume that the events leading to Gaona's discharge on January 24, 1977, would not have occurred but for the discriminatory transfer on November 14. Accordingly, I find that by reason of the foregoing, and also when considered in the context of the other unfair labor practices found herein, Respondent's discharge of Gaona was violative of Section 8(a)(3) and (1) of the Act. I further find that Gonzales coercively interrogated and threatened Gaona on November 11, 1976, in independent violation of Section 8(a)(1) of the Act.

### E. *The Discharge of Gerardo Moncivais*

Gerardo Moncivais worked for Respondent for about 8 months a year since 1969. During the summer months he was a migrant worker in other parts of the country. For the most of this period he had worked on the kill floor, but during the last period he became a truckdriver and drove a cattle truck under the supervision of Azael Gonzales.

Moncivais attended the union meetings which were held in November and December, 1976, and he signed a union card on November 8, 1976. During this period he was a union supporter and solicited employees to sign union cards at their homes and during break periods at the plant.

On December 12, 1976, Moncivais drove a truck about 8 miles out of town, at which point the engine failed and the truck came to a halt. Upon calling the maintenance

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[10] At the hearing the General Counsel amended the complaint to allege this transfer as a violation.

department, the maintenance crew brought out another truck for him to continue on his way and towed back the one he had been driving. Moncivais testified that he told the maintenance men that the oil and water pressure were okay. He subsequently asked mechanic Carlos Vasquez what was wrong and Vasquez advised, he said, that some parts had been broken due to a pin that had fallen into the motor.

On December 19, 1976, Moncivais experienced another breakdown while en route to Edinburg, Texas. Moncivais testified that he pulled to a stop when the engine started to knock. Upon his call, the maintenance department again brought out another truck and towed the truck he was driving back to the plant. Moncivais said that before he continued on his way he and the two mechanics checked the oil and water pressure and found them to be okay.[11]

The cost of repairing the first truck ultimately was $3,571. The cost of the second truck was $6,541.38.

Moncivais' supervisor, Azael Gonzales, did not discuss the matter with him on either of these occasions. Thereafter on Monday, December 20, and Tuesday, December 21, Moncivais was sent out on two separate trips. Throughout this period of time, Moncivais was driving almost daily, averaging seven or eight trips per week. After a few days passed without being assigned another trip after the December 21 trip, his last one, Moncivais called Gonzales on about December 24 to ascertain what was wrong.[12] Gonzales told him that he had been suspended and that Vice President Rogelio Salinas wished

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[11] On each of these occasions the trucks were empty.

[12] The trips assignments were made by telephone calls to the drivers' homes, therefore not making it necessary for the drivers to come to the plant for assignment.

to speak to him on the following Monday. Upon seeing Salinas, Rogelio told him that he did not think it was a coincidence that the trucks had broken down and that he would make a further determination as to his continued employment after speaking to Gonzales. About a week later, Moncivais called Gonzales and at this time was informed by Gonzales that he had been terminated but that he did not know the reason therefor. Moncivais then called Rogelio Salinas and asked that he be given a reason for his termination. Salinas thereupon advised that he did not believe that the breaking down of the trucks was a coincidence and that he did not have any more work for him. Moncivais credibly testiefid that the conversation then continued as follows:

> So I then told him that if he would investigate the mechanism, he would know that it wasn't my fault that the trucks had broken down. And he said he didn't have to investigate anybody, and in a loud manner, he told me that he didn't have to tell me anything or give me any explanation why he was terminating me from my job.

Called by Respondent, Rogelio Salinas testified that Moncivais was discharged after he checked with Don Meis, then Respondent's maintenance and mechanic supervisor, who told him that in his opinion the trucks in question had been abused.[13] He confirmed telling Moncivais that he was terminated because "two engines ruined within 10 days was too much of a coincidence."

Examination of the record reflects that Respondent's asserted reason for the discharge of Gerardo Moncivais

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[13] Salinas testified that Respondent discontinued assigning trips to Moncivais after he first spoke to Meis and was so informed. He said that when Moncivais called him the second time he again spoke to Meis and was similarly informed.

does not stand up under scrutiny. This becomes particularly apparent because the record conclusively demonstrates that Respondent witness Donald Meis was not telling the truth with respect to a most important aspect of Respondent's defense. Thus, Meis testified that when Salinas asked his opinion concerning the damage to the trucks, he told Salinas, "I felt in both cases there was negligence or abuse involved . . . by the driver." Testifying that the damage in both trucks involved a bearing seizure (and a damage crankshaft in one), when further asked if he attributed this to any wrongdoing on the part of the driver, Meis responded, "Well, mechanical . . . it could happen, but I did attribute it to wrongdoing on the part of the driver in the degree of damage occurred to the engine. I think it could have been lessened through closer observation at the time when the problem . . . it should have been stopped earlier." Coming closer to the point, Meis testified that both trucks were repaired in Respondent's maintenance shop under his supervision. From the record it appears that truck number 23, one of the trucks, was repaired at Respondent's shop. While the record and the testimony of Meis does not clearly establish this point, for decisional purpose I shall assume that it does. However, when specifically asked on direct examination if he supervised the repair of the other truck (truck number 19), Meis responded, "*yes, sir we did; we did it at our shop, uh huh.*" The questioning then continued as follows:

> Q. Did you, as a result of your repairing that vehicle, do you have any opinion as to the cause, or any casual relationship as to what caused that vehicle to break down?
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> A. This engine was severely damaged, and indications were to me that it had been over-speeded.

Respondent's Exhibit 14 is a repair bill from Mack Trucks of Corpus Christi, Texas. This document completely refutes the testimony of Meis that truck number

19 was repaired at Respondent's shop, for it shows on its face that it was repaired by Mack Trucks. And, as Meis finally admitted under cross-examination, by the Mack Truck dealer at its Corpus Christi location where the truck was sent for repair.[14] Moreover, the document, which lists the parts and labor involved, is headed with the notation "Major Overhaul (Removal)." It was this truck that involved a total repair cost of $6,541.38.

Obviously, the foregoing in itself raises a serious question concerning the credibility of Respondent's entire defense as to Moncivais' case. Moreover, the Mack repair bill for truck number 19 bears the stamped date of January 21, 1977, which is well beyond the date that Moncivais was discharged. Although it was far from established that the "major overhaul" was entirely due for whatever occurred when Moncivais was driving the truck, it is clear that Respondent did not know the cost of the repair at the time it terminated him.

Beyond the foregoing, it is undisputed that neither Meis nor Rogelio Salinas nor any other supervisor ever questioned Moncivais concerning the disabled trucks. Absent an outside reason, it would be reasonable to assume that Respondent would have been interested in his version as to just what occurred. Accordingly, for this and the other reasons related above, I am convinced and find that the reason given by Respondent for the discharge of Moncivais, namely the matter of the two truck breakdowns while Moncivais was driving, was a pretext and that the real reason for his discharge was because of his assisting and supporting the Union. As to Salinas' charge that these incidents were "more than a coincidence," if this be taken to intimate that Moncivais deliberately sabotaged them, there is no evidence whatsoever to indi-

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[14] Respondent Exhibit 14 shows that Mack Trucks also has a facility at Austin, Texas, as well as at Corpus Christi.

cate that such was the case. Not only do I credit Moncivais to the effect that the breakdowns were accidental and did not result from his fault, but there is nothing to reflect that the organizing campaign was conducted other than in an orderly manner and without incident. I recognize that there is no direct evidence of Company knowledge concerning Moncivais' union activity.[15] However, reference is made to the reasons for my inferring Company knowledge in the previously discussed case of Ignacio Santos. For the same reasons, I find that Company knowledge as to Gerardo Moncivais is also inferable.[16]

In sum, and in view of all the foregoing, I find that Moncivais was discharged in violation of Section 8(a)(3) and (1) of the Act.

F. *The Reduction in Hours of Manuel Olivares*

Manuel Olivares has been employed in Respondent's maintenance department (miscellaneous work, not as a mechanic) since September 1958, under the supervision of Mateo Veliz. The complaint alleges that his hours of work were discriminatorily reduced.

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[15] Moncivais testified that on November 20 and 23, 1976, he respectively spoke in favor of the Union to Reynoldo Villarreal and Rogelio Landeros. He said that he later learned that both of those individuals, with whom he was friendly, had been promoted to assistant supervisors. However, since neither of them are alleged in the complaint to have been supervisors, and since the matter of their supervisory or nonsupervisory status was not litigated at the hearing, I do not rely on this testimony as establishing Company knowledge.

[16] In addition, and as discussed in the section dealing with the discharge of Mario Moncivais, *infra*, it is noteworthy that Supervisor Armando Garcia told Mario Moncivais that all of the Moncivaises would be discharged because they were responsible for bringing the Union in.

Olivares was very active in the union campaign. In addition to attending the union meetings, he distributed 30-40 union authorization cards at the plant before and after work and during the noon break period.

In the fall of 1976, one Frances Molina [17] told Olivares that Octavio Salinas was angry at him and that he wanted to know something about the Union. Octavio Salinas is the father of Roberto and Rogello Salinas and at the time was Chairman of the Board. Following his conversation with Molina, Olivares went to Salinas' office. Salinas asked if he was handing out cards to the employees. When Olivares then asked how he knew this was so, Salinas stated that he had been so apprised by other employees. After stating that he did not want the Union, Salinas again asked if he was a union member. Olivares said that he was.[18]

In December 1976, Hector Herrera, the maintenance and cleaning supervisor, told Olivares that the Company would fire him if he continued his union activities or if he had anything to do with the Union.[19]

On January 21, 1977, Supervisor Azael Gonzales saw Olivares about to go to the office and observed that Olivares was wearing a union insignia on his cap. On this occasion he told Olivares to "take off that damned cap" if he was going into the office. On February 3, 1977, Supervisor Armando Garcia called Olivares into the office and told him that although the Company had helped him for a long time, he had become ungrateful and had turned his back on the Company. When Olivares re-

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[17] Although Olivares testified that Molinas was a supervisor, his supervisory status was neither admitted nor litigated. I relate this conversation only because it is explanatory as to what followed.

[18] Olivares' testimony concerning this conversation was not controverted.

[19] I do not credit Herrera's testimony to the effect that he never told Olivares that he would fire him because he supported the Union.

sponded that he did not know what he (Garcia) was saying, Garcia told him "don't act stupid," that he had found out that he was distributing cards during working hours. Garcia then went on to say that the Company was going to watch him and that if they caught him with a union card or a union decal, he would suspend him.[20]

At all times material hereto, except that mentioned below, Olivares worked from 6 a.m. to 5 p.m. On February 25, 1977, Supervisor Azael Gonzales came up to Olivares as he working with Supervisor Ernesto Martinez and stated, "What S.O.B. told you that you could put in so many hours?" Olivares replied that this was up to his supervisor. Gonzales then stated, "From now on I want to see you in at eight and take your—[obscenity deleted] at 3:00 o'clock." Olivares responded to this by saying that he had worked for the Company a long time and did not care, but that he would report Gonzales' statement to the union representative. Gonzales thereupon said, "And if you keep up with this damned union, I'm going to fire you." [21]

The record reflects that the hours of Olivares were reduced from 8 a.m. to 3 p.m. for a period of approxi-

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[20] Garcia testified that he spoke to Olivares after having received complaints that he had been pressuring people to sign cards during working hours. He said that he told Olivares to discontinue the activity during working hours but that he could pursue it during his nonworking hours. When Olivares denied soliciting during working hours, he said, he again told him "don't do it on our time." Garcia further testified that Olivares asked him to name the employee who had complained to him, but that he told Olivares that it "was none of his business." Olivares, a manual and odd job worker, has a hearing handicap and appears to have been the butt of various jokes and nicknames at the plant. He nevertheless impressed me as an honest and forthright witness. I do not believe his testimony to have been contrived and I credit it.

[21] The undenied testimony of Olivares. Neither Azael Gonzales nor Ernesto Martinez were called to testify.

mately 2 weeks immediately following the above conversation. Respondent offered no explanation for this sudden reduction in the hours of this employee. In view of the coercive statements made to Olivares by various supervisors during the several months prior to this incident, and particularly in view of Gonzales' final statement to Olivares in the February 25 conversation, i.e., "if you keep up with the damned union I'm going to fire you," it is clearly apparent, especially in the absence of any explanation by Respondent, that the reduction of Olivares' hours was taken as a measure of retaliation against him for his union activities. Respondent thereby violated Section 8(a)(3) and (1) of the Act. I further find that Respondent, by the supervisors named above, independently violated Section 8(a)(1) of the Act by interrogating Olivares concerning his union activities, by threatening him with discharge or suspension because of his union activities, and by telling him, in effect, to remove the union insignia he was wearing.[21a]

G. *The Termination of Felix Rodriquez, Jr.*

Felix Rodriguez, Jr., was employed on the loading dock from November 1975 to January 15, 1977, under the supervision of Foreman Hector Garcia. Rodriguez was 17 years of age when discharged by Respondent on the latter date. Initially a part-time employee, he became a full-time employee during the summer of 1976.

Rodriguez attended two or three union meetings held at the home of employee Indolcio Garcia in the fall of 1976 and signed a union card in November or December 1976. Rodriguez' undenied and credited testimony concerning a conversation he had with Foreman Hector

[21a] Employee Pedro Hernandez likewise testified that on two occasions, one shortly after the election and again on about April 25, 1977, Armando Garcia told him to remove a union decal from his cap. The same violation is found as to these incidents.

Garcia in December 1976, while he was working on the loading dock, was as follows: Garcia asked if he knew anything about the Union. Rodriguez said no. Garcia persisted and asked if he was with the Union. This time Rodriguez said yes. After then asking if Rodriguez did not know that the Company was doing the underage employees a favor by letting them work there, Garcia finally stated that the Company would fire them if the Union won.

Also undenied was the following conversation. A few days before the January 1977 election, Garcia came up to Rodriguez and David Lara, the latter another minor. Referring to a truck that was passing by, Garcia told them that they would be like "those old men, dirty and working in the sun," because the Company was going to fire them when the Union lost.

On January 15, 1977 (about a week after the election) Garcia called Rodriguez and three other minor employees into his office and told them they were being terminated because they were under 18 and could not work there in the difficult jobs. He stated that they would be welcome to work there again when they became 18. With this these employees were terminated.

Respondent asserts that Rodriguez and the other minors were terminated because of a government regulation pertaining to minor employees and that this action took place when it did because of the following circumstances. Thus it was the testimony of Julia Clark, a Respondent office employee and also secretary to Roberto Salinas, that in December 1976 she received a telephone call from an individual (named either Martinez or Rodriguez, she said) who identified himself as being with Laredo branch of the Department of Labor. This individual, she said, asked to speak with Reuben Lara, an employee in Respondent's personnel and accounting department. Advising that Lara was not in, Clark said that she would

take a message. According to Clark, the caller then asked if the Company had any employees under 18. When she responded that some high school employees were usually hired for odd jobs, the caller stated, according to Clark, that the Company could be fined up to $1,000 per employee if it had employees under 18 working on the loading dock or the kill floor, and further, that this should be checked out. Clark later added that during the conversation the caller stated that Lara had called him to request some information and that he would be sending some pamphlets to him. Still later, under cross-examination, Clark testified that the caller first referred to a minimum wage increase that would be effective on January 1, 1977, and that he then asked about the minor employees. At this point she also testified, "I guess he [the caller] said he was going to call back to Mr. Lara." In any event, Clark testified that "After I hung up with him I told Mr. Salinas about it, and he said he would take care of it." Curiously, upon later cross-examination, Clark testified that none of the Salinases were present at the time of the call and that no one else from management was present in the office. Indeed, at another point, Clark testified that she went to see Salinas immediately after the call, but that she had to wait a few moments because "he was with someone in the office."

Roberto Salinas testified that Clark told him about the foregoing call, whereupon he called his attorney, John Mann, and asked him "to check the law and let us know if we were actually in violation." What transpired from thenceforth may be set forth as stated in Respondent's brief as follows:

> John Mann testified as to his being the general counsel for the Respondent in all but labor matters. He indicated he recalled receiving the inquiry from the Salinases about the use of minors and asked one of his associates to research the question. (TR. 1056).

> Mann went on to testify that it was about this time that his firm emloyed the undersigned [Ben F. Foster] as attorney for Respondent in the pending NLRB proceedings. Mann testified that the result of his associate's research was to advise against the employing of minors in and around a meat packing facility. Mann further testified that he relayed this to the undersigned who agreed with his overall evaluation and interpretation of the applicability of the child labor provision of the Fair Labor Standards Act. (TR. 1046). As a result of this, the Respondent was advised by its attorneys to discharge all persons on the payroll who had not yet attained the age of 18, regardless of their classification. At the instruction of counsel, the Respondent discharged some ten (10) persons believing them to be the total number of persons employed by the Respondent who had not yet attained the age of 18. The majority of the discharges were effective January 15, 1977.

Before turning to my conclusions some further facts are here in order. Called by the General Counsel on rebuttal, Gildardo Rodriguez testified that he is the sole representative employed by the U.S. Department of Labor in Laredo, having been employed there for 3½ years. No one else is present in the office, even in his absence. Rodriguez testified that to his recollection he had never made any inquiries of Respondent concerning the employment of minors. However, Rodriguez did testify that in about April or May, 1977, he received a call from someone in the Respondent Company inquiring about provisions of the Child Labor Law. Rodriguez said that at this time he explained that persons under 18 were prohibited from working in slaughtering areas and in the handling of carcasses. This leads to a further fact, namely, that the provisions and orders of the Child Labor Law *do not* prohibit persons under the age of 18 from working at any

and all jobs in a packing plant. Thus, insofar as relevant here, Order No. 19 restricts minors from working in the following specific hazardous ocupations in the slaughtering, meat-packing or processing, or rendering industry: All occupations on the killing floor; all boning occupations; all occupations that involve the pushing or dropping of any suspended carcasses, half carcass or quarter carcass; all occupations involving hand-lifting or hand carrying any carcass . . . .[22]

I turn now to my conclusions. Aside from the various actions which followed, it is clear that Respondent's defense as to Rodriguez is first of all predicated on what may be described as an alleged semi-anonymous telephone call. I have previously related the confusing fragmentary, inconsistent and contradictory testimony of Julia Clark concerning this telephone call and what she purportedly did after receiving it. However, assuming that she did receive a call from someone who identified himself as the local (Laredo) representative of the U.S. Department of Labor, and further assuming that he questioned her about Respondent's employ of minors and stated that Respondent could be fined up to $1,000 for employment of them on the loading dock or the kill floor, I find it incredible to believe that Respondent or its representatives would not make a simple telephone call to the U.S. Department of Labor in Laredo to ascertain who made the call and/or what statements allegedly were made to Respondent's secretary . . . particularly before actually discharging these employees. In this connection, it is also noteworthy that the caller in the telephone conversation sought to speak to Reuben Lara. Again, it would seem logical that Salinas, upon being apprised of the conversation by Clark, would have talked to Lara to see if he could shed

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[22] General Counsel Exhibit 19, "A Guide to Child Labor Provisions of the Fair Labor Standards Act."

some light on the situation. This he did not do.[23] Beyond all the foregoing, it is clear that Rodriguez' job on the loading dock was not one of those declared to be hazardous under the provisions of the Fair Labor Standards Act. Considering the many years that Respondent has been in business, it is doubtful, to say the least, that Respondent would not have been familiar with the law. In any event, and without further comment as to Respondent's misapplication of the Fair Labor Standards Act, I do not credit the reason given by Respondent for Rodriguez' discharge, but find that he was discharged for reasons related to his union activities. Direct evidence of such unlawful motivation is shown by the statements made by Respondent's supervisors to Rodriguez and another minor employee prior to their January 15 termination.[24] I have previously set forth Resondent's unlawful interrogation of Rodriguez and Supervisor Garcia's statements to him that he would be fired because of his union activities. Ramiro Perez, Jr., also a minor, was similarly broached by Supervisor Hector Garcia on the loading dock about 2 or 3 days before the election. On this occasion Garcia asked if he did not know that the minors were going to be fired. Perez said that he could do nothing about it. Garcia asked if he was with the Union. Perez answered, "yes." Garcia then stated, "you're going to be fired, too." [25] Accordingly, and as indicated above,

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[23] Reuben Lara was not called to testify.

[24] This does not include certain damaging statements alleged to have been made by Juan Bautista to Gerardo Landeros, the latter one of the minors who was terminated. Although the General Counsel amended the complaint to allege Bautista as being a supervisor within the meaning of the Act, the testimony reflects only that Bautista directed other employees in their work when Garcia was not present. However, the employee who so testified stated that Garcia was present most of the time. There being no other evidence to establish that Bautista was a supervisor, I find that the General Counsel has not sustained his burden as to this allegation.

[25] The undenied testimony of Perez.

I find that Respondent's discharge of Felix Rodriguez, Jr., was in violation of Section 8(a)(3) of the Act.[26] It also found that Respondent's conduct, by Hector Garcia, in interrogating employees concerning their union activity and telling employees that they would be fired if the Union won the election or because they supported the Union was violative of Section 8(a)(1) of the Act.

H. *Mario Moncivais*

Mario Moncivais was 14 years of age when he began working in Respondent's maintenance department in 1969. After becoming a local truckdriver in October 1975, he started working as an over-the-road driver in June 1976. During the summer of 1976 he averaged three trips a week. Returning to school in September, Supervisor Armando Garcia permitted him to continue working part time as a helper, this entailing a weekly trip to Corpus Christi, Texas, on Saturdays.

Mario, as he will be referred to because there are other Moncivais brothers involved in this case, signed a union card in November 1976 and thereafter attended union meetings. On an occasion in December 1976, Mario went to Garcia's office to pick up a check. Garcia at this time asked whether he was with the "good guys" or with the bad guys. Mario responded that he was with the good guys.[27] Under the entire circumstances of this case, it is

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[26] During the hearing General Counsel, with the Charging Party's approval, withdrew the cases of three other minors who were named as discriminatees in the complaint. These were Gerardos Landeros, Ramiro Perez, Jr., and David Lara. Whatever the reason for this action, and no specific reason was given, I nevertheless have decided the case of Felix Rodriquez on its own merits. The fact that the General Counsel had some reason for withdrawing the other alleged discriminatees is no reason, as the Respondent apparently contends, for me to draw an adverse inference as to the case of Rodriquez.

[27] Undenied testimony of Mario.

clear and I find that Garcia and Mario understood that reference to good or bad guys dealt with the subject of the union campaign.

In about the first week of April 1977, Mario went to see Garcia about getting a trip. On this occasion, which was the last time Mario saw Garcia in person, Garcia told Mario that because of all this bullshit about the Union he was going to fire all the Moncivaises [of whom there were three brothers] along with the truckdrivers. He also stated that this would happen because the Moncivaises were responsible for bringing in the Union.[28] At the end of the conversation Garcia told Mario to see the office receptionist about getting a trip. When he did, she told him that he "couldn't have a trip."

Following the above conversation, Mario waited for about 3 weeks without getting a trip. He finally called Garcia's assistant, Rudy Barrera. Upon inquiring about getting a trip, Barrera was of no help except to comment that he ought to "get the picture." Mario thereupon called Garcia and asked the same question about getting a trip. To this Garcia responded by saying that he had "only leftovers for the Moncivaises" and that he no longer had a job for him. With this Mario was obviously terminated for he never received any trips thereafter.

Garcia gave two highly inconsistent reasons for Mario's termination. Thus he testified that Mario was let go "because we had to eliminate all the other under 18 personnel, and he was under 18," but then he said "we needed to eliminate all the part-time drivers and hire more full time drivers." I do not believe that Mario was terminated for either of these reasons. Indeed, little need be added to the statement made by Garcia to Mario to the clear effect that he was being terminated because

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[28] Although Garcia in effect denied ever talking to Mario about the Union, I credit the testimony of Mario as cited above.

the Moncivaises were responsible for bringing the Union in. This being the reason for Mario's termination, as I find it to be, Respondent thereby violated Section 8(a) (1) and (3) of the Act.[26]

## I. *The Discharges of Eight Truckdrivers on April 29, 1977*

### 1. Background

Respondent terminated the following truckdrivers on April 29, 1977: Oscar E. Martinez, Alfredo Moncivais, Samuel Medina, Jr., Jose Escamilla, Jaime Galvan, Jr., Gregorio Juarez, Jr., and Juan Ramon Macias. Although the eighth driver, Abel Hinojosa, was not terminated until May 6, 1977, he was assertedly terminated for the same reason as the others and his case will be included in the group consideration. The reason given by Respondent for the termination of these employees, which will be dealt with more fully later in this Decision, is that it was notified by its insurer that these drivers were no longer insurable. I shall first set forth the pertinent background.

*Oscar Martinez* was employed by Respondent as a truckdriver since March 23, 1972. As were all the truckdrivers hereinafter discussed, Martinez worked under the supervision of Amando Garcia. In discussing the case of Ignacio Santos, *supra*, I have already noted how Martinez was interrogated by Garcia in November 1976, and how Garcia at that time asked him to keep an eye on other employees and to let him know if they were active in

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[29] While it is hardly necessary to buttress this finding, with reference to the reason given that Mario was one of the under 18 personnel it is noteworthy that the other employees in this category were discharged on January 15, 1977. Moreover, since Mario testified that he was 14 years of age when hired in 1975, it appears, that he was well over 18 when terminated April 1977.

the Union. During this conversation Garcia also told Martinez that he had a list of several truckdrivers and kill-floor employees who had signed cards. Martinez credibly testified that on several occasions after that Garcia asked if he had information about other employees, but that he said no. In addition, in late December 1976, Garcia told Martinez that he had spoken to other truckdrivers, namely, Jesus Ramon, Carlos Martinez and Felipo Elizondo, and had requested them to try to obtain the same information for him.

On Sunday, April 17, 1977, Martinez went to a union meeting. At the time he left his children with his parents. When one of his children became ill, Sylvia Gutierrez, who is the sister of Martinez and also the former wife of Armando Garcia, telephoned Garcia and asked if Martinez had gone to a company meeting. She did this because although she knew that Martinez had gone to a metting, she did not know he had gone to a union meeting. In any event, Garcia told Gutierrez that the Company did not have a meeting and that he probably was at a union meeting. Having thus learned that Martinez was at a union meeting, Garcia called Martinez later the same day and asked how the meeting had gone. When Martinez replied "all right," Garcia asked if the Union would give them lots of benefits. Martinez said, "Yes, everything looks okay in the contract." According to the credited testimony of Martinez, Garcia then stated, "Well, right now I never figured you would be participating in the union activity and all that because I had trusted you in helping me out with the supporting—or finding out who were involved in the union and it seems you were with it, too. As of right now I know where you stand." Additionally, Martinez related that during this conversation Garcia also stated he had a list of truckdrivers, that he (Martinez) now was involved, that he had 50 applications, and that if there were any changes he was not to get his hopes too high.

*Alfredo Moncivais* was employed as a truckdriver since 1967. An active union supporter, Moncivais attended union meetings and early in the organizational campaign solicited employees to sign union cards. Although Moncivais himself was never interrogated or threatened, it will be recalled he was one of the two employees whom Garcia asked Oscar Martinez to keep an eye on concerning their involvement with union activities.

Moncivais testified that in about mid-December 1976, he and 10 or 15 other employees were called into the gym in the presence of the Salinas brothers and two other supervisors. According to Moncivais, Roberto Salinas at this time stated that if the Union came into his plant he would rather shut it down and that he would make his best efforts to fire all the guys involved with the Union. Also, that he was not going to permit outsiders to come in and tell him how to run his company. Roberto Salinas emphatically denied ever telling Moncivais or anyone else that he would close the plant if the Union came in or that he would make his best effort to fire all the people involved with the Union. I was impressed with Salinas' denial of all the foregoing and I credit his testimony to this effect. Moreover, although Moncivais testified that 10 or 12 employees were present, it is noteworthy that no other witnesses corroborated his testimony as to Salinas' alleged threats. Indeed, Gregorio Juarez, an older truckdriver and the only other employee to testify concerning this meeting, testified as follows:

> Roberto Salinas addressed us and told us that the Union had taken them by surprise and since we were the workers who had been working longer, he wanted us to assist him, to help him, to assist him in advising the younger workers there, the people who were newer there to vote against the Union. *That's all he said.* [Underlining supplied]

In short, I do not credit the testimony of Moncivais concerning the threats he asserted to have been made by Salinas at this time.

*Samuel Medina, Jr.*, was employed as a truckdriver since January 21, 1974. He signed a union card on December 18, 1976, and thereafter attended all the union meetings. No supervisor ever spoke to him about the Union or his union activities prior to his termination.

Medina testified that on May 2, the date of his termination, he went to see Garcia after having been informed by Juan Macias that he would be terminated. He said that he knocked on the door of Garcia's office and that Garcia told him to come in and sit down. According to Medina, Garcia was in the midst of a telephone conversation when he entered. Medina's further testimony concerning this incident was as follows:

> I took a seat there and he kept talking to this other person on the telephone.
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> I heard him tell the other person on the telephone that he needed truck drivers. He told this person on the telephone that he was hoping and praying that he could get rid of the truck drivers that he had. He told again this person on the telephone that he wanted to get rid and finish up with all of the truck drivers that he had because they were participating in the union.
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> * * *
>
> He told this person again on the telephone not to forget that he needed truck drivers and that all the truck driver needed was just as a driver's license.

Garcia denied having had any telephone conversation wherein he made statements of the foregoing nature. Although he said he did make calls to the Texas Employment Agency with respect to procuring new drivers, he

denied making any such calls in the presence of any of the drivers. Although I have discredited much of Garcia's testimony in this case, in this instance I do not credit the testimony of Medina as quoted above. Notwithstanding that Garcia openly interrogated and threatened other employees concerning their union activities, I cannot and do not believe that Garcia was so naive or foolish as to invite Medina to sit down in his office and then in his presence proceed to state to the other person on the phone that he was discharging the drivers because of their union activities.

*Jose Escamilla* was employed since September 17, 1976, as a truckdriver helper. He attended several union meetings and signed a union card.

In November 1976, Garcia asked Escamilla if he was aware that the employees were trying to get a union in the plant. Escamilla said that he was, but that only the inside employees were trying to organize. Garcia stated that there was no way the Company would allow the Union to come in and asked if he would help him "to go against the union." Escamilla replied that it was "all right" that he agreed with his idea.

*Jaime Galvan, Jr.*, was employed as a truckdriver since January 21, 1974. He attended union meetings in the fall of 1976 and signed a union card on December 18, 1976.

In late December 1976, Garcia told Galvan that he heard the truckdrivers were responsible for bringing the Union in and asked if he knew anything about it. Galvan said no. He then told Galvan that he wanted him to be on the Company's side because the Union was no good.

Garcia called Galvan over the telephone and told him that he was being terminated because of the insurance problem. Galvan came to pick up his check a day or two later, at which time he went to the office and saw Garcia.

Upon receiving his check, Galvan asked Garcia how long it would take "to work something out." Garcia asked, "How many tickets do you have" Galvan said, "Around six." According to the credited testimony of Galvan, Garcia then said, "Well, don't even think about it. Maybe by that time I won't be here myself, that's what you get for going with the union. Go to the little people in the union and see if they can't help you." Garcia then referred him to Leda's office if he wished to see his traffic record.[30]

*Gregorio Juarez, Jr.*, was employed with Respondent since July 25, 1955, and was a truckdriver at the times material hereto. He signed a union card on November 10, 1976, and thereafter attended several union meetings.

Juarez testified concerning an alleged conversation he had with one Victor Saucedo in December 1976 wherein Saucedo told him that he could not hunt on the Salinas' property that year because he was a union supporter. At the hearing the General Counsel amended the complaint to allege Saucedo as being a supervisor within the meaning of the Act. Respondent denied this allegation. Juarez testified that he did not know whether Saucedo was a supervisor or not, but said that "he is very close to the office personnel." He added that he previously knew him to be "a worker in the warehouse." Other than conclusionary testimony by Manual Olivares and Abel Hinojosa that Saucedo was "a supervisor in the warehouse" the supervisory status of Saucedo was not litigated. There being no evidence that Saucedo held any indicia of supervisory authority, Juarez' testimony concerning this incident is not binding upon Respondent.[31]

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[30] I do not credit Garcia's testimony that the Union was never mentioned during this discussion.

[31] It is recommended that all Section 8(a)(1) allegations as to Saucedo be dismissed.

Other than the foregoing, it will be recalled that Oscar Martinez was told by Garcia to keep an eye on Juarez, Jr., with respect to his union activities.

*Abel Hinojosa* was employed as a truckdriver since August 10, 1975. He signed a union card in November 1976, and thereafter attended a number of union meetings. Other than to testify concerning a conversation with Victor Saucedo, whose supervisory status was not established, Hinojosa did not have any conversation with any Respondent supervisor concerning his union activities.

*Juan Ramon Macias* was a truckdriver with Respondent from August 28, 1974, until April 19, 1977. An active union supporter, Macias attended union meetings, signed a card, and testified that he went to the homes of other employees to solicit them to sign union cards.

Macias testified that he attended a union meeting at the Carpenters Hall on April 17, 1977. With Union Representative Rendon and 35 or 40 employees present, this meeting concerned Respondent's latest offer during contract negotiations which were then taking place. The following day Garcia took Macias aside and said he wanted to talk to him. Macias testified that the following conversation ensued.

> We were talking outside the office. He told me that he had been told that I was the one who was speaking more for the union than anybody else, that I was the one that was asking for too much. That I was the one that was pushing the rest of the truck drivers to join the union.
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> So he told me to be sure to get my ass straight or that I would be faced with some trouble. This was just a warning. I told him I didn't know what he was talking about. He told me that I knew very well what he was talking about and for me to be careful.

Concerning that part of his above testimony that he was "speaking more for the union," Macias further clarified this by saying, "Yes he was referring to the meeting of the previous day and that he knew that I had made more demands than what we were being given, more that what was offered."

Garcia denied ever having a conversation with Macias and testified, "I don't like that gentleman myself, and I try to talk to him the least possible." From my observation of the witnesses, and in the context of the entire record as it concerns Garcia, I credit the testimony of Macias.

2. Respondent's Defense; Conclusions as to the Termination of the Truckdrivers

As will be further explicated below, the record clearly shows that the General Counsel has established a strong *prima facie* case in support of the complaint's allegation that the truckdrivers under consideration were terminated in violation of the Act. But I turn first to Respondent's defense, which is that it terminated these employees when it received notification from its insurer that they had become uninsurable. This notification was in the form of a letter addressed to Respondent President Salinas dated April 26, 1977. It stated as follows:

> Dear Roberto:
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> I have received a letter from the Firemen's Fund Insurance Company requesting the exclusions of the following drivers from your policy: Epigmenio Oscar Martinez, Jr., Alfredo Moncivais, Jose Escamilla, Samuel Medina, Gregorio Juarez, Abel Hinojosa, Francisco Cabello, Jaime Galvan, Jr. and Juan Macias.
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> As you well know your automobile experience has not been good for the past three years. Your Experi-

ence Modifier went up five points, from 177% Debit to 182% Debit.

We must insist that you return the Exclusion Forms TX03-60A on the above named drivers no later than the first of May.

I have enclosed copies of the Motor Vehicle Records on the above named drivers for your information and I trust that in reviewing the drivers records you will recognize the urgency of the situation.

Sincerely,

J. C. Martin III
Insurance Associates, Inc.

Under normal circumstances, Respondent's defense on its face would appear to be meritorious. A scrutiny of the entire record, however, convinces me that absent antiunion motivation Respondent would not have discharged these drivers so promptly without, at the very least, having first taken some further action in an effort to retain these mostly senior and experienced employees,[32] some of whom were admittedly described as Respondent's best drivers.[33] The first consideration for my so con-

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[32] Except for Jose Escamilla, hired in September 1976 and Abel Hinojosa, hired in August 1975, the others were senior employees.

[33] The evidence does not, however, support a finding of collusion between Respondent and its insurer. As part of the facts of this case, however, I should note that the letter from the Firemen's Insurance Company, referred to in the April 26, 1977 letter, above, was not introduced in evidence. Also not explored further was the fact that the exclusionary forms reflect the name of the insurance company as being the National Surety Corporation, although Insurance Associates, Inc. is named as its duly authorized representative.

Insofar as past practice is concerned, the evidence reflects that in the past Respondent terminated other drivers upon receiving

cluding its that there is direct evidence pointing to the fact that Respondent discharged these employees in retaliation for their known or suspected union activities and support of the Union. The background of Respondent's coercive conduct against its employees, including the truckdrivers, in the fall of 1976 has been previously related and will not be restated at this point. Specifically, however, it is particularly significant to recall that at this time Garcia was keeping the truckdrivers under surveillance. This was evidenced by Garcia's telling employees Oscar Martinez and Juan Melendez that he had a list of the employees, including the truckdrivers, who had signed cards or who were for the Union. But getting to the direct evidence, there is first the testimony of Mario Moncivais, whose unlawful termination was clearly established, concerning a conversation he had with Garcia in the first week of April 1977, which bears repeating here. Thus, it was during this conversation that Garcia told Mario that he was going to fire all the Moncivaises along with the truckdrivers because they were responsible for bringing in the Union. Clearly, this testimony is direct evidence that the discharge of the truckdrivers which followed but 3 weeks thereafter was an unlawful implementation of Garcia's prediction. Second, and further indicative of Respondent's intentions, was Garcia's statement to Oscar Martinez on April 17, 1977, in the context of Garcia's then having learned for the first time that Martinez had attended a union meeting and that he was a prounion employee, that he had 50 applications and that he (Martinez) was not to get his hopes too high if any

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notice of their uninsurability, although in most cases the drivers were given other employment with Respondent until they again become insurable. However, it is also interesting to note that in the past Respondent at most had been called upon to exclude one or two drivers from the insurance policy, whereas eight were terminated for the period in question. Nonetheless, without anything further, I do not rely on this as a decisional factor to the issue at hand.

changes were made. Thirdly, there was the threatening statement of Garcia to Juan Macias, the day after he attended the April 17, 1977, union meeting, that this was a warning for him to get his ass straight or he would be in trouble. Finally, and this indeed was tantamount to an admission that the truckdrivers were terminated because of their union activities, was Garcia's statement to Galvan at the time of Galvan's termination that "that's what you get for going with the union . . . go to the little people in the union and see if they can't help you out."

Apart from the foregoing direct evidence of discrimination, not to mention the numerous other unfair labor practices found herein, the evidence reflects that two of the dischargees admittedly included Respondent's two best driver. Thus, Garcia testified, "Him [Alfredo Moncivais] and Gregorio Juarez, those were my best drivers." With respect to Alfredo Moncivais he further testified that he was "A damn good driver, he was my best driver." The point to be made is, I find it difficult to believe that Respondent would terminate these senior, best qualified drivers, along with the others, on the mere receipt of the afore-quoted letter without first exploring some other avenues of retaining them. There is indeed evidence that some other steps could have first been taken, for Garcia himself testified that when Alfredo Moncivais asked what could be done about his termination, he told Moncivais "*we're going to check and see what we can do about the insurance* and in the meanwhile . . . why don't you take your vacation, and then check with me and see if there's anything we can do." [34] Notwithstanding this clear indication that Respondent could take further steps before finally discharging these employees, the fact is there is no

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[34] Underlining supplied. And similarly, Juan Macias testified that when notified of his termination, "*Garcia told us that he was going to look and see what arrangements he could make with the insurance company* and in the meantime we should take our vacations and we would be laid off later."

evidence whatsoever to indicate that it did. Had it done so, the *bona fides* of Respondent's motives may well have been established. But its failure in this respect, in my view, serves but to buttress the strong *prima facie* case that the discharges of these employees were discriminatorily motivated.[35]

There remains for consideration a further facet of Respondent's defense. Thus Respondent contends that demonstrative of its good faith in discharging the truck-drivers for the reason given is that it allegedly offered the drivers other jobs when the discharges were effected. In this regard, it is undisputed that at about the time of the terminations Union Representative Erbey Rendon came to the plant and, after some discussion, reached an agreement with President Roberto Salinas that Respondent would find jobs for the terminated drivers on the kill floor as soon as such jobs become available. Concerning Respondent's compliance with this agreement, the record shows as follows: Escamilla, Galvan and Juarez were offered and accepted jobs on the kill floor. However, because they found the work disagreeable, they quit after working for periods of from 1 day to 3 weeks. Hinojosa was offered a laborer's job four weeks after he was terminated but did not accept it because it involved a reduction in pay. Medina testified that when he went to the plant he was told that Leda was supposed to contact him for a job, but that he never did. Macias came to the plant and spoke to Roberto Salinas. Salinas told Macias that he would be called as soon as an opening occurred on the kill floor. According to the unrefuted testimony of Macias, he was not called and was never there-

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[35] Although the question, of insurability does not appear to have been involved at the time, it is noteworthy that Respondent retained Alfredo Moncivais in its employ notwithstanding that in 1974 or 1975 a judge had placed this employee on probation due to a traffic violation.

after offered a job. As to Alfredo Moncivais and Oscar Martinez, the testimony reflects that these employees were never offered a job. Accordingly, since the record reflects, and I find, that four of the eight truckdrivers were not offered jobs following their termination, Respondent's asserted good-faith defense in allegedly offering all of the jobs does not stand up. I am, therefore, impelled to find that while the principle of Respondent's defense may be well taken, it is factually without merit.

In sum, and in view of (1) Respondent's surveillance of the truckdrivers' union activities; (2) its threats to discharge the truckdrivers because of their union activities; (3) its admission to one of the truckdrivers that his union activity was a reason for his discharge; (4) its failure to follow up on its assurance to two aforementioned truckdrivers that it would see what it could do about the insurance problem; and (5) in the context of its numerous other violations of Section 8(a)(1) and (3) of the Act, including discrimination against Mario Moncivais, I conclude and find that the termination of the truckdrivers, at least in substantial part, was in retaliation for their union activities and support of the Union. Respondent thereby violated Section 8(a)(3) and (1) of the Act. I further find that the other coercive conduct hereinabove described, except for that noted in the footnote below, to be independently violative of Section 8(a)(1) of the Act.[36]

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[36] The unfair labor practice charge pertaining to the termination of the truckdrivers was filed on October 5, 1977, in Case 23-CA-6762. Apparently because he considered it to be a Section 10(b) problem, the General Counsel did not allege in the complaint any conduct occurring in the fall of 1976, based upon the heretofore related testimony of the truckdrivers, as being independently violative of the Act. In fact, at the hearing the General Counsel specificially disavowed any intention of so amending the complaint and asserted that he was introducing the testimony covering this period

### J. *The Alleged Reduction in Hours of Work of Certain Truckdrivers; Alleged Heavier Workloads*

The complaint in Case 23-CA-6797 alleges that on or about the latter part of September 1977 the Respondent reduced the hours of work of the following truckdrivers: Juan Melendez, Juan Ramon Quintana. Alberto Garcia and Felipo Elizondo.[37]

The pertinent background facts areas follows: Employed since June 1, 1975, *Melendez* signed a union card in February or March of 1977, and thereafter attended union meetings. In the middle of September 1977, Respondent was informed that he had been designated a union steward. Without relating the details, suffice it to note that in December 1976, Melendez was interrogated by Supervisor Hector Garcia concerning his attendance at a union meeting (Garcia also told him that he knew he had attended the meeting) and his signing of a union authorization card.[38] *Quintana* was employed by Respondent since May 9, 1971, signed a union card and attended all union meetings. *Alberto Garcia* was employed since June 16, 1975, signed a union card in December 1976 and thereafter attended several union meetings. In September 1976, Supervisor Armando Garcia interrogated Gar-

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for background purposes only. I have, accordingly, received and considered it only for that purpose. In any event, any coercive conduct involving the truckdrivers in the fall of 1976 would not add to the remedial provisions of this Decision, as based upon the other unfair labor practices herein found.

[37] Elizondo did not testify and he was not discussed or mentioned in the General Counsel's brief. It therefore appearing that the General Counsel has abandoned the case of this employee, it is recommended that the allegation pertaining to him be dismissed.

[38] The matter is outside the 10(b) period and is not alleged in the complaint.

cia as to his knowledge of union activities, as to whether any of the truckdrivers were participating in such activities and as to whether any of them had signed union cards.[39]

Shortly after September 9, 1977, the Union provided Respondent with a list of employees who had signed union cards.[40] It is the General Counsel's contention that the alleged reduction of hours of the alleged discriminatees occurred simultaneously with the submission of this list, that the hours of the nonunion employees were not similarly reduced, and that hence discrimination is established. In support of this allegation, Melendez, Quintana and Garcia testified that they did not receive as many trips after about the middle of September 1977 as they did prior thereto, but that more trips were given to the recently hired nonunion employees than were given to them.

Subsequent to the close of the hearing, the General Counsel and the Respondent submitted Joint Exhibit 1, hereby received in evidence, which reflects the total number of hours worked per week, including overtime, from the week of April 29, 1977, through the week ending December 30, 1977. Although the parties did not submit their respective analysis or interpretation of this material, I set forth below the summaries which I have prepared showing the total number of hours worked between the period of the week ending September 23, 1977, through the week ending December 30, 1977. As indicated these are separately noted for the three alleged discriminatees, the other union employees who are not named in the complaint, and the nonunion employees.

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[39] The preceding footnote is also applicable here.

[40] Stipulation of the parties, R-834.

| The Discriminatees | | Other Union Employees [41] | | Nonunion Employees | |
|---|---|---|---|---|---|
| A. Garcia | 584 | L. Aguilar | 709 | S. Gaona | 759 |
| J. Melendez | 675 | A. Blanco | 721 | P. Jiminez | 658 |
| J. Quintana | 636 [42] | O. Elizondo | 739 | G. Lopez | 715 |
| F. Elizondo | 726 | A. Lares | 681 | J. Pompa | 777 |
| | | A. Melendez | 640 | J. Santana | 695 |
| | | J. Morales | 594 | A. Munoz | 697 |
| | | J. Venegas | 807 | | |
| | | T. Venagas | 699 | | |

Upon examination of the foregoing, it becomes apparent that some degree of discrimination might be established if ony hours worked by the three named alleged discriminatees are compared with the nonunion employees. However, the General Counsel's case of discrimination quite obviously rests with his selection of these three particular union employees for comparison with the nonunion employees. Absent a showing that Respondent had some motive to uniquely discriminate against these employees as apart from the other union drivers, and there is none, there is no objective basis for finding discrimination against the three named in the complaint. This must follow since the data submitted shows that on the whole the eight other union employees worked just as many hours as did the six nonunion employees. Indeed, J. Venegas, a senior and a union employee employed since February 7, 1965, worked more hours than did any of the nonunion employees. Accordingly, and by reason of all the foregoing, it is recommended that this allegation be dismissed.

With respect to the same three employees named above, the complaint further alleges that Respondent discriminatorily assigned them heavier workloads without assist-

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[41] L. Aguilar and A. Lares did not become union members until November 10, 1977, at which time Respondent was so notified.

[42] J. Quintana is shown to have been on vacation for part of 2 days in October 1977.

ance. In support of this allegation Juan R. Quintana testified to the effect that in September 1977 he made three or four trips without the assistance of a helper. Since he was usually assigned a helper, the effect on these occasions was to make his work more onerous. Other than to have signed a union card and to have attended some union meetings, Quintana was not shown to have been particularly active in union activities. He was not, as were many other of the employees, in any way broached by Respondent concerning the Union or his union activities. The General Counsel has not shown any reason for Respondent to select Quintana, among all the other drivers, for particular discrimination in the manner alleged. The only other testimony concerning this allegation was that of Alberto Garcia, who testified that in November 1977 he was assigned a heavy load with 11 stops without a helper. Again, there is no reason shown why Respondent would discriminate against Garcia on this isolated occasion in November 1977, which was long after it received a list of the union drivers. Whatever suspicions may attach itself to the foregoing, I am convinced and find that the General Counsel has not proved the allegation in question by a preponderance of the evidence. It will therefore be recommended that this allegation be dismissed.

### K. *The Alleged Section 8(a)(4) Violations; Jose Villarreal*

The complaint in Case 23-CA-6762 alleges that Respondent discharged Jose Villarreal on September 20, 1977, in violation of Section 8(a)(4) and (1) of the Act.

Employed from May 24, 1975, until being terminated on September 19, 1977, Villarreal worked as a meat packer in the boning department under the supervision of Santos Garcia. Although only 15 years of age when he first became employed, Villarreal stated his birthdate

on his employment application as being May 15, 1958, instead of his correct birthdate, which was May 15, 1960. As previously related, the other minors were terminated on January 15, 1977. Villarreal was not, apparently because of his mistated age.

On January 24, 1977, Pedro Garza, who worked in personnel, told Villarreal that his application had been lost and asked that he file a new one. Villarreal did so and at this time stated his correct age on the application. He submitted the application to Pedro Garza.

The hearing in this proceeding began on August 23, 1977, and continued through August 26, 1977, at which time it was adjourned. Subpoenaed by the General Counsel on August 9, 1977, Villarreal appeared at the hearing for 3 days beginning on August 23. Although he did not testify during this period, it is undisputed that he showed his subpoena to a supervisor and that he was observed at the hearing by at least one Company official.

Shortly after the conclusion of the hearing on August 26, Respondent's counsel raised a question with President Roberto Salinas, who had attended the hearing during the period in question, as to the identity of Villarreal. He also asked Salinas that this employee's file be checked.[43]

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[43] The foregoing was brought out in the direct examination of Salinas as follows:

Q. All right. Do you recall how it was brought to your attention in September of 1977 that Mr. Villarreal possibly may still be under the age of 18 and yet still employed by the company?

A. It was during one of these hearings that you questioned me about who is that, and I said I don't know. And we checked on him, and he was not on the list that were called for witnesses. That's what I recall about that.

Q. So, at my request, you went back and searched some files and found Mr. Villarreal's file?

A. Right.

According to Respondent, upon checking Villarreal's file it learned for the first time that Villarreal was underage. It is undisputed that Respondent terminated Villarreal on September 19, 1977, for the asserted reason that he was underage.[44]

Upon all the foregoing, it is clear that Villarreal would not have been terminated but for his appearance under subpoena to testify on behalf of the General Counsel on the dates indicated in August 1977. But beyond this, and pointing to Respondent's unlawful motive in discharging this employee at this time, is the fact that Respondent retained Villarreal in its employ notwithstanding that it in fact had knowledge of Villarreal's true age prior to his appearance at the hearing. Although Respondent denies such prior knowledge, the facts reflect otherwise. In the first place, it is undisputed that Villarreal's actual age was stated on the second application which Villarreal submitted in January 1977. Additionally, Villarreal testified without contradiction that he revealed his true age to Supervisor Hector Garcia about 6 or 7 months after he first began his employment in May 1975. But even assuming that the foregoing did not come to the attention of Respondent's higher officials on the occasions indicated, the credible testimony reflects that the problem of Villarreal's age was revealed to it during a meeting held on Febduary 11, 1977, at which time Union Representative Erbey Rendon and the Union's attorney met with Roberto Salinas and two of Respondent's attorneys for the purpose of discussing various of the discharges which had then taken place. Rendon credibly testified that during this meeting he raised the question of Villarreal's age by asking why Villarreal had not been discharged in Janu-

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[44] Respondent's basis for discharging the employees under 18 has been discussed in this Decision under the heading "Felix Rodriguez, Jr., *supra*.

ary 1977 along with the other minors.[45] Accordingly, if Respondent was objectively concerned about retaining minors in its employ, it surely was put on notice at this time that a problem existed in this respect as to Villarreal.

Upon all the foregoing, I conclude and find that Respondent's termination of Villarreal on September 19, 1977, was violative of Section 8(a)(4) and (1) of the Act.

L. *Alleged Unilateral Conduct*

The complaint in Case 23-CA-6797 alleges that Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally granted a wage increase in August, 1977. That a wage increase in fact was given in July or August, 1977 to 15 or 30 employees is not disputed. Concerning this wage increase, Union Representative Rendon testified without contradiction that on the evening of July 27, 1977, following a day of contract negotiations, Respondent's attorney telephone and asked if Respondent could implement the wage increase as provided in the Company's latest contract proposal Rendon, who was with the union attorney who received the call, told the attorney he would not agree because they were still in contract negotiations. The attorney thereupon told Respondent's attorney that he would not agree. As indicated, Respondent nevertheless granted the wage increase notwithstanding that the Union did not agree. Inasmuch as the wage increase was implemented even

[45] Respondent's brief states, "Salinas testified that the union representatives refused to submit [at this meeting] the name of the individual to the Company representatives." This is not in accord with the record. Thus, on direct examination Roberto Salinas testified that he recalled it being mentioned at the February 11, 1977 meeting that the Company still had an individual in its employ who was under the age of 18 and that someone asked that this individual be named. When then asked if he *recalled* any response to the latter question, Salinas simply responded that he did not recall.

though the parties had not reached an impass, it is clear that by such unilateral action Respondent violated Section 8(a) (5) of the Act.[46] I so find.

It is further alleged in the complaint that in the latter part of September 1977 Respondent unilaterally changed the seniority provision in the collective-bargaining agreement which was executed on September 9, 1977. Article V thereof, the provision referred to, provides in substance that seniority shall be considered as a factor in its "promotions, demotions, lay offs and recalls after layoffs." There being no evidence to support this allegation, it is recommended that it be dismissed.[47]

It is finally alleged that in the latter part of September 1977 Respondent unilaterally changed the driver and helper schedule set forth in Appendix B of the contract. This allegation pertains to the testimony, cited in Section J herein, of Quintana that he made three or four trips in September 1977 without a helper and of Alberto Garcia that in November 1977 he was assigned a heavy load without a helper. Assuming that these isolated instances were not in strict accord with the contractual provisions, it is well established that a breach of contract is not *ipso facto* an unfair labor practice.[48] Moreover, I think it relevant that there is no evidence that the Union sought to police or enforce the contract by protesting or discussing the matter with the Company. Accordingly,

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[46] *N.L.R.B.* v. *Bennie Katz, d/b/a Williamsburg Steel Products Company*, 369 U.S. 736.

[47] In his brief the General Counsel argues that this provision is applicable to the assignments of trips, and recites the same facts with respect to the alleged reduction of hours of certain truckdrivers as discussed in the preceding section. Assuming *arguendo* that Article V includes that seniority should be applied to the assignment of trips, for the same reasons heretofore stated, I would find that the evidence does not support this allegation.

[48] *Wilson & Co., Inc.*, 89 NLRB 310; *American Vitrified Products Company*, 127 NLRB 701.

and since this matter was relatively isolated and does not appear to have "a continuing impact on a basic term or condition of employment," [49] it is recommended that the allegation be dismissed.[50]

## IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of the Respondent, set forth in section III above, occurring in connection with the operations of Respondent described in section I above, have a close, intimate and substantial relationship to trade, traffic and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

## V. The Remedy

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

It having been found that Respondent discharged Daniel Mendoza, Rodrigo Gaona, Ignacio Santos, Gerardo Moncivais, Felix Rodriquez, Oscar E. Martinez, Alfredo Moncivais, Samuel Medina, Jr., Jose Escamilla, Jaime Galvan, Jr., Gregorio Juarez, Jr., Abel Hinojoso, Juan Ramon Macias and Mario Moncivais in violation of Section 8(a)(3) and (1) of the Act, I shall recommend that Respondent be ordered to offer them full and immediate reinstatement to their former positions or, if these positions no longer exist, to substantially equivalent positions, without prejudice to their seniority and other rights and

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[49] *C & S Industries, Inc.*, 158 NLRB 454.

[50] A different conclusion might well have been reached if the Union had indeed protested the matter with the Respondent but that Respondent nonetheless continued the practice.

privileges, and to make them whole for any loss of earnings they may have suffered from the date of their discharges to the date of Respondent's offer of reinstatement. Backpay shall be computed in accordance with the formula prescribed in *F. W. Woolworth Company*, 90 NLRB 289, with interest thereon computed in the manner and amount prescribed in *Florida Steel Corporation*, 231 NLRB No. 117.[51] It having been found that Respondent reduced the hours of Manuel Olivares in violation of Section 8(a)(1) and (3) of the Act, I shall recommend that he be made whole for any loss of earnings he may have suffered therefor.

It having been found that Respondent discharged Jose C. Villarreal in violation of Section 8(a)(4) and (1) of the Act, I shall recommend that Respondent offer him full and immediate reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority and other rights and privileges, and to make him whole for any loss of earnings he may have suffered from the date of his discharge to the date of Respondent's offer of reinstatement. Backpay shall be computed in the manner indicated above.

In view of the nature and extent of the unfair labor practices herein found, it will be recommended that Respondent be ordered to cease and desist from in any manner infringing upon the rights guaranteed employees in Section 7 of the Act.

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

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[51] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By engaging in the conduct described in section III, above, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1), (3), (4) and (5) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

5. The Respondent did not discriminate against Juan Aguilar, Juan Melendez, Juan Ramon Quintana, Alberto Garcia and Felipo Elizondo as alleged in the complaint.

On the basis of the above findings of fact, conclusions of law, and the entire record and pursuant to Section 10(c) of the Act, I hereby issue the following recommended: [52]

## ORDER

Respondent Laredo Packing Company, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Discharging or reducing the hours of employees, or in any other manner discriminating against them, because they engage in union activities or support the Union.

(b) Interrogating its employees concerning their union activities or their knowledge of the union activities of other employees.

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[52] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(c) Threatening its employees that it will close the plant if they engage in union activity or support the Union.

(d) Threatening to discharge employees because of their union activities or support of the Union.

(e) Creating the impression of surveillance of its employees' union activities.

(f) Prohibiting employees from wearing union insignia at the plant.

(g) Unilaterally granting wage increases to its employees during bargaining negotiations without consultation or agreement with the Union.

(h) In any other manner interfering with, restraining or coercing its employees in the exercise of the rights protected under Section 7 of the Act.

2. Take the following affirmative action deemed necessary to effectuate the policies of the Act:

(a) Offer to employees Daniel Mendoza, Rodrigo Gaona, Gerardo Moncivais, Felix Rodriquez, Oscar E. Martinez, Alfredo Moncivais, Samuel Medina, Jr., Jose Escamilla, Jaime Galvan, Jr., Gregorio Juarez, Jr., Abel Hinojosa, Juan Ramon Macias, Mario Moncivais and Jose Villarreal immediate and full reinstatement to their former jobs or, if these positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of wages and earnings they may have suffered in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Make Manuel Olivares whole for any loss of wages and earnings he may have suffered for any loss of wages and earnings he may have suffered by reason of the discrimination practiced against him.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facility in Laredo, Texas, copies of the attached notice marked "Appendix."[53] Copies of said notice, which are to be printed in English *and* Spanish, on forms provided by the Regional Director for Region 23, after being duly signed by Respondent's representative, shall be posted by Respondent immediately thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced or covered by any other material.

(e) Notify the Regional Director for Region 23, in writing, within 20 days from the date of receipt of this Decision, what steps Respondent has taken to comply herewith.

It is further recommended that the complaint be dismissed insofar as it alleges the commission by Respondent of any unfair labor practices not specifically found herein.

Dated, Washington, D.C. September 12, 1978.

/s/ John P. von Rohr
JOHN P. VON ROHR
Administrative Law Judge

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[53] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD." shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

## APPENDIX

[SEAL] [SEAL]

## NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

WE WILL NOT discharge our employees, or reduce their hours, or in any other manner discriminate against them for joining or supporting Amalgamated Meat Cutters and Butcher Workmen of North America, Local No. 171, affiliated with Amalgamated Meat Cutters and Butcher WORKMEN OF NORTH AMERICA, AFL-CIO, or any other union.

WE WILL NOT interrogate our employees concerning their union activities or the activities of other employees, nor will we interrogate them concerning their attendance at union meetings.

WE WILL NOT threaten to close our plant if the employees join or support the Union or engage in union activities.

WE WILL NOT threaten to discharge our employees if they join or assist the Union or engage in union activities.

WE WILL NOT prohibit employees from wearing union insignia at the plant.

WE WILL NOT create the impression of surveillance of the union activities of our employees.

WE WILL NOT unilaterally change the rates of pay of our employees without first bargaining with the above-named Union.

WE WILL offer full reinstatement to the employees listed below and give them backpay plus interest, as set forth in the Decision of the Administrative Law Judge:

| | |
|---|---|
| Daniel Mendoza | Jaime Galvan, Jr. |
| Rodrigo Gaona | Gregoria Juarez, Jr. |
| Ignacio Santos | Abel Hinojosa |
| Gerardo Moncivais | Juan Ramon Macias |
| Felix Rodriquez | Mario Moncivais |
| Oscar E. Martinez | Jose Escamilla |
| Alfredo Moncivais | Jose C. Villarreal |
| Samuel Medina, Jr. | |

WE WILL make Manuel Olivares whole for any loss of earnings he may have suffered by reason of the discrimination practiced against him.

WE WILL NOT in any manner interfere with our employees' exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act, as amended.

LAREDO PACKING COMPANY
(Employer)

Dated _____ By _____
(Representative) (Title)

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THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, One Allen Center, Rm. 920, 500 Dallas Ave., Houston, TX 77002 (Telephone No. 713-226-4722).

## APPENDIX C

**Sections 8(a)(1) and (3) of the National Labor Relations Act of 1935, as amended,**

**29 U.S.C.A. Sections 158(a)(1) and (3) (1973)**

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

* * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making any agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employee as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided, further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization

(A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.